EDITOR'S NOTE

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(2)

No. 92-6484

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES EDWIN SHERROD,
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS

JAMES EDWIN SHERROD, Petitioner in the above-entitled cause, appearing by GAYLYN LEON COOPER, counsel, moves the Court for an order allowing him to proceed in the above-entitled cause in forma pauperis and to prosecute his appeal therein to The United States Supreme Court without being required to prepay fees or cost or give security therefor before or after the bringing of these proceedings, Petitioner would show unto the Court that the United States District Court for the Eastern District of Texas, Beaumont, Division, duly appointed Gaylyn Leon Cooper as his counsel of record under the Criminal Justice Act of 1964, as amended, 18 U.S.C. section 3006A(d)(6), as shown by the attached Exhibit A.

WHEREFORE PREMISES CONSIDERED, petitioner respectfully requests that this Honorable Court permit petitioner to proceed in forma pauperis in this cause.

Dated November 2, 1992.

Respectfully submitted,

GAYLYN LEON COOPER
Attorney of Record for
James Edwin Sherrod

****

NO._____

****

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES EDWIN SHERROD,

Petitioner

V.

UNITED STATES OF AMERICA,

Respondent

****

PETITION FOR WRIT OF CERTIORARI TO THE

UNITES STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

****

PETITON FOR WRIT OF CERTIORARI OF
JAMES EDWIN SHERROD

****

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(409) 832-6333

ATTORNEY OF RECORD FOR
PETITIONER, JAMES EDWIN
SHERROD

QUESTIONS PRESENTED FOR REVIEW

1. Whether the defendant-petitioner was denied his constitutional right od due process under the Fifth Amendment and right to confront his accusers under the Sixth Amendment because the Government witnesses deliberately destroyed the controlled substances and the containers in which they were located without getting an accurate measurement of the quantities contained, which was a prequisite under the indictments and the Federal Sentencing Guidelines.

2. Whether the district court erred in finding the quantity of methamphetamine applicable to be 17.5 kilograms and determining the base offense level to be 34 under the Federal Sentencing Guidelines.

3. Whether the district court erred in finding the quantity of methamphetamine applicable too be 17.5 kilograms and determing the base offense level to be 34 under the Federal Sentencing Guidelines because the district court included unusable waste material in determining the weight of the mixture.

LIST OF ALL PARTIES TO PROCEEDING

A list of all parties to the proceeding in the United States Court of Appeals for the Fifth Circuit whose judgment is sought to be reviewed is as follows:

United States of America----------Plaintiff-Respondent

James Edwin Sherrod----------Defendant-Petitioner

Lonnie Jerell Cooper----------Defendant

Steven Lee Sherrod----------Defendant

Jerry Wayne Sewell, Sr.----------Defendant

Jerry Wayne Sewell, II.----------Defendant

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NO._____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES EDWIN SHERROD,

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ATTORNEY OF RECORD FOR
PETITIONER, JAMES EDWIN
SHERROD

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NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES EDWIN SHERROD,

Petitioner

VS.

THE UNITED STATES OF AMERICA,

Respondent

****

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES OF AMERICA,

****

Petitioner, James Edwin Sherrod respectfully prays that a wit of certiorari issue to review the judgment of the United States Court of Appeals Fifth Circuit affirming the conviction and sentence of the petitioner, James Edwin Sherrod, based upon materially unreliable information that the quantity of methamphetamine seized was 17.5 kilograms, in violation of the defendant's constitutional right of due process and right to confront his accusers, and because the weight of the mixture included unusable waste material.

CITATION TO OPINION BELOW

The opinion of the United States Court Of Appeals Fifth Circuit is reported in United States of America v. James Edwin Sherrod, et al, (964 F2d 1501 5th Cir. 1992, and appears in Appendix A to this Petition. The judgment of conviction and sentence of the United States District Court for the Eastern District of Texas, Beaumont Division, appears in Appendix B to this petition.

JURISDICTION

The Court of Appeals Opinion in this matter was filed on June 23, 1992. A timely Petition for Rehearing was filed on July 6, 1992 by Jerry Wayne Sewell, Sr. and Jerry Wayne Sewell, II. The Court of Appeals' denial of the Petitions for Rehearing was issued on August 3, 1992 and is set forth in Appendix B. This Court's jurisdiction is invoked under the following statutes and Rule 10 of the Supreme Court:

(1) Title 28, U.S.C. Section 1254(1);

(2) The decision of the Fifth Circuit Court of Appeals is in conflict with the decisions of other United States Courts of Appeal on the same matter, to-wit: United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991); United States v. Jennings, 945 F.2d 129 (6th Cir. 1991), and United States v. Elmer Acosta, 963 F.2d 551 (2nd Cir. May 1992), which hold that the term "mixture" used in the United States Sentencing Guidelines Section 2D1.1 does not include unusable waste mixtures of controlled substances;

(3) The Fifth Circuit Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court and conflicts with the rationale of the decision of this Court in Chapman v. United States, 500 U.S. , 114 L.Ed 2d 524, 111 S.Ct. 1919 (1991).

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

UNITED STATES SENTENCING GUIDELINES--PART D--OFFENSES INVOLVING DRUGS

"Section 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)

(a) Base Offense Level (Apply the greatest);

* * *

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

* * *

* Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level. In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater."

STATEMENT OF THE CASE

The United States District Court, Eastern District of Texas, Beaumont Division, has jurisdiction pursuant to Title 18, U.S.C.§ 3231.

This is a criminal action in which the defendant-petitioner, James Edwin Sherrod, and four other defendants, were originally charged in a two-count indictment on March 14, 1989 with (1) conspiracy to manufacture phenylacetone (P2P), amphetamine and methamphetamine, and (2) manufacturing phenylacetone (P2P). There were no allegations as quantity and the original indictment contained no enhanced penalty provisions under 21 U.S.C. Section 841(b) (1)(A). On May 18, 1989 the Government filed a superseding indictment containing three counts, two of which alleged enhanced penalty provisions. Count 1 of the superseding indictment charged the defendant, James Edwin Sherrod, with conspiracy to manufacture phenylacetone (P2P),

amphetamine, and methamphetamine, and to possess with intent to distribute amphetamine and methamphetamine involving one kilogram or more of a mixture or substance containing a detectable amount of methamphetamine. Count 2 of the superseding indictment charged the defendant with manufacturing phenylacetone and Count 3 of the superseding indictment charged the defendant with manufacturing one (1) kilogram or more of a mixture or substance containing a detectable amount of methamphetamine.

Under 21 U.S.C. Section 841(b) the penalty range for the foregoing offenses are determined by the quantity of the controlled substances involved. In addition, under the Federal Sentencing Guidelines, the quantity of the controlled substances is the determining factor in assigning an offense level for sentencing purposes (See Drug Quantity Table under Section 2D1.1 of the Federal Sentencing Guidelines).

The facts in this case showed the following:

(1) The government filed a motion and obtained an ex parte order in advance of a drug raid by DEA agents on a suspected laboratory near Orange, Texas authorizing the destruction of any chemicals seized the raid; (Appendix of James Edwin Sherrod, G-2).

(2) The DEA agents presumably knew in advance that the Federal Sentencing Guidelines were based on the type and quantity of drugs seized;

(3) The DEA agents, armed with this knowledge,

went into the bus laboratory in the March 11, 1989 raid without any measuring devices whatsoever and seized suspected methamphetamine, took samples, and then destroyed not only the suspected methamphetamine but also their containers without measuring the quantities seized. (Testimony of DEA Chemist George Lester on November 1, 1989, pp. 33-55). In doing so, they simply "estimated" the quantity of suspected methamphetamine seized even though there were measuring devices available to them in the bus laboratory, including (a) a one quart measuring cup, (b) a 5000 milliliter beaker, and (c) an Ohaus triple beam balance scale (2,610 gram). Appendix of James Edwin Sherrod, G-1).

(4) The DEA agents filled out two reports detailing the quantity of suspected methamphetamine seized: (a) DEA Form-6 and (b) DEA Form-7 in which they reported the quantity of suspected methamphetamine seized to be 4,500 milliliters or 4,500 grams (4.5 kilograms); (Appendix of James Edwin Sherrod G-3, G-4).

(5) The DEA forensic chemist, George W. Lester, also filled out a DEA Clandestine Laboratory Report in which he reported that the maximum capacity or quantity of methamphetamine that the laboratory could produce was 1,500 grams; (Appendix of James Edwin Sherrod, G-5; George Lester Testimony given on October 19, 1989, p. 50.).

(6) The Hazardous Waste Manifest prepared by Disposal Systems, Inc., an independent contractor selected and employed by the U.S. government showed that the quantity

of suspected methamphetamine collected and turned over to them for destruction was 1.25 gallons (4.73 kilograms) (Defendant's Exhibit No. 8, Appendix of James Edwin Sherrod, G-6). This calculation by an independent contractor is almost identical to the quantity of methamphetamine reported by the Government DEA agents although calculated in different measurements (gallons vs. kilograms).

(7) In the government brief filed on July 6, 1989 by the U.S. attorney in response to the Motion of the defendant, James edwin sherrod, to Dismiss the Indictment, the government advised the trial court that the quantity of methamphetamine seized was 4,500 grams or 4.5 kilograms; (Government's Response to Defendant James Edwin Sherrod's Motion to Dismiss Indictment - Record on Appeal as to Sherrod, Vol. 8, pp. 166-176).

(8) At the plea hearing of Jack Rhodes, a co-defendant, in July 1989 the government advised the court that if Rhodes were to go to trial, the government would call Drug Enforcement Agency chemist George Lester to testify and that Lester would testify that the total amount of the substances containing methamphetamine involved in the conspiracy was equivalent to 4.5 kilograms. (Unpublished Opinion of Fifth Circuit in U.S. v. Jack Rhodes, No. 90-4538, rendered Sept. 27, 1991).

In spite of the foregoing undisputed facts, the DEA chemist, George W. Lester, testified at the trial of this case on October 19, 1989 (seven months after the drug raid)

that his earlier reports and estimates made at the time of the raid were inaccurate and that the correct quantity of methamphetamine seized was 17.5 kilograms--four times as much as he had previously estimated--without any advance notice to the petitioner's counsel and without any opportunity to be effectively cross-examined since both the suspected methamphetamine and their containers had been destroyed! Such testimony is so incredible.

At the conclusion of the trial the jury convicted the defendant, James Edwin Sherrod, along with the other four defendants, of all three offenses charged. Based upon the testimony of the government's chief chemist witness, George Lester, that the quantity of methamphetamine seized was 17.5 kilograms (not 4.5 kilograms as the government had contended before the trial) the presiding judge, the Honorable Richard A. Schell, applied the Federal Sentencing Guidelines and found the appropriate offense level in this case to be 37. The court then sentenced the defendant to 240 months in prison. (Appendix C of James Edwin Sherrod).

From that action the defendant, along with the other four defendants, timely took an appeal to the Fifth Circuit Court of Appeals. That court affirmed the conviction and sentence of all five defendants in a written opinion handed down on June 23, 1992.

REASONS FOR GRANTING WRIT

Certiorari should be granted for two reasons: This Petition represents an issue resolved by implication by

this Court but not specifically and unequivocally decided by this Court; and the Opinion of the Fifth Circuit Court of Appeals conflicts with the decisions of three other Circuit Courts of Appeal.

A. GOVERNMENT'S OUTRAGEOUS CONDUCT

In United States v. Russell, 411 U.S. 423, 36 L.Ed.2d 366, 93 S.Ct. 1637 (1973), the Supreme Court discussed the concept of a case where the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction. It is submitted that such a case is presented here with the fundamental concept of due process and fairness would not countenance what occurred in this case.

The requirements of due process are not suspended with the pronouncement of guilt, but continue to operate in the sentencing process. Gardner v. Florida, 430 U.S. 349, 51 L.Ed. 2d 393, 97 S.Ct. 1197 (1977). Thus, the sentencing judge may not rely on mistaken information or baseless assumptions. United States v. Lemon, 723 F.2d 922 (D.C. Cir. 1983). A criminal defendant has an inherent constitutional right to be sentenced only on the basis of information which is reliable and not materially false. Roberts v. United States, 445 U.S. 552, 63 L.Ed.2d 622, 100 S.Ct. 1358 (1980); Townsend v. Burke, 334 U.S. 736, 92 L.Ed 1690, 68 S.Ct 1252 (1948); United States v. Weston 448 F.2d 626, 633 (9th Cir.

1971); United States v. Baylin, 696 F.2d 1030 (3rd Cir. 1982).

The Federal Sentencing guidelines became effective November 1, 1987. Under the Federal Sentencing Guidelines the penalty assessed for possession or manufacture of a controlled substance is determined by basically two factors: (1) the type of controlled substance involved and (2) the quantity of controlled substance found. The Sentencing Guidelines, have a drug quantity table which gives the various offense levels. For example, at the time of the offense charged here on March 11, 1989 one (1) gram of methamphetamine was equivalent to two (2) grams of cocaine. (Drug Equivalency Tables). If the quantity of methamphetamine found was between 2.5 kilograms and 7.45 kilograms (5-14.9 KG cocaine), the base offense level was 32. If the quantity of methamphetamine found was 7.5 and was 25 kilograms (15-49.9 KG cocaine), the base offense level was 34. (§ 2D1.1, Drug Quantity Table).

Presumably both the Drug Enforcement Administration agents and the United States Attorney had knowledge of the Federal Sentencing Guidelines. Despite this knowledge, the DEA agents and the United States Attorney, at the time that they requested a search warrant on March 11, 1989 to search Dan Hill's place where the suspected clandestine laboratory was located, filed a motion and obtained an order authorizing the destruction of the chemicals found at such clandestine laboratory. However,

such order did not require--or even mention--that the DEA agents should determine the quantity of chemicals found by accurate measurement before their destruction. (Appendix, James Edwin Sherrod, G-2).

Armed with such order the DEA agents, Milton Shoquist and George W. Lester, went into the bus laboratory and started taking samples of suspected controlled substances. Under the undisputed testimony neither of them brought any type of measuring device with them. Thus, Milton Shoquist testified that he did not take any kind of measuring equipment with him (Statement of Facts, Vol. 4, PP. 180-181) and that he relied on the chemist, George Lester, to measure the substances (Vol. 4, p. 181); that Mr. Lester (the DEA chemist) did not pour the contents into any measuring device and that with respect to measurements, they simply " estimated" the quantities (Vol. 4, P. 186); that Mr. Lester made the estimates and Shoquist simply put down the figures Lester gave him (Vol. 4, P. 186).

George Lester testified that he simply estimated the quantities of controlled substances (Statement of Facts, George Lester Volume, October 19, 1989, P. 32). Lester admitted that he initially estimated the brown substance in the metal pan to be 2,000 milliliters or 2 kilograms (P. 34) and the liquid in the coke canister to be 2 kilograms (P. 35), for a total of 4 kilograms (PP. 35-36). These are the same figures that he wrote down on the DEA Form 7 Report of Drug Property Seized. However, on October 19, 1989 when

he testified in court, he claimed that his previous estimates were erroneous and there were, in fact, 17 kilograms of methamphetamine in the metal pan and coke canister, an increase of over four (4) times as much! (George Lester Testimony, October 19, 1989, P. 37).

This gross error in failing to measure the exact quantities of alleged methamphetamine found in the bus laboratory is compounded by the fact that even though the DEA agents did not take any measuring devices were available in the laboratory itself. Thus, there were, in fact, three measuring devices which are shown in the government's photographs, inventory list, and videotape: (1) a quart measuring cup, (2) a 5,000 milliliter glass flask, and (3) an Ohaus triple beam balance scale (Appendix, James Edwin Sherrod, G-1). If the DEA agents, Shoquist and Lester, had used any one of these three measuring devices, an accurate measurement of the quantity of methamphetamine allegedly found could have been obtained.

Certainly the trial testimony of Shoquist and Lester as to their new "calculation" of the quantity of methamphetamine found (17.5 kilograms) is unreliable for many reasons:

First, it is over four times their original estimate contained in several DEA forms prepared by agents Shoquist and Lester which were relied on not only by defendants' counsel but also by the United States Attorney in his opposition to defendant Cooper's Motion to Dismiss

Indictment:

Second, it is based solely upon their trial testimony that the metal pan was "half full", neither of which is supported anywhere by any written statement, record or document;

Third, the photographs and videotape taken by the Orange County Sheriff's department show not one but two coke canisters, only one of which is noted on the inventory list attached to the search warrant return, and the quantity of the contents of either steel coke canister is not ascertainable visually or otherwise. The contents of the coke canister were emptied without measurement except for DEA Forms 6 and 7 recording that it contained 2,000 milliliters. In addition, the unsolicited statement of James Edwin Sherrod at the time of his arrest after the search warrant was executed indicated that the coke canister contained 1,800 milliliters (Defendant's Exhibit No. 10);

Fourth, the Uniform Hazardous Waste Manifest prepared by Disposal Systems, Inc., an independent contractor selected and employed by the U.S. Government, showed that the quantity of suspected methamphetamine collected and turned over to them for destruction by their measurements was 1.25 gallons (4.73 kilograms) (Defendant's Exhibit No. 11, Appendix, James Edwin Sherrod, G-6);

Fifth, instead of measuring the suspected methamphetamine at the time that the search warrant was

executed on March 11, 1989 the DEA agents waited until five months after the superseding indictment was filed and one day before trial to make their "measurements" of similar containers, some seven months after both the controlled substances and the containers had been deliberately destroyed!

In cases involving drug violations, the quantity of the substance constitutes a critical element of the offense under 21 U.S.C. Section 841 (b) (6). United States v. Alvarez, 735 F.2d 461 (11th Cir. 1984); United States v. Crockett, 812 F.2d 626 (10th Cir. 1987). Since the indictment against James Edwin Sherrod only charged him with conspiracy to possess with intent to distribute one kilogram or more of methamphetamine and did not specify 17.5 kilograms, the district court could not sentence Sherrod to 240 months to imprisonment. United States v. Crockett, supra.

The critical issue presented before this court is whether or not it is a denial of a defendant's Fifth Amendment right to due process of law for the Government to file a superseding indictment alleging a specific quantity of controlled substances, thereby invoking the enhanced penalty provisions under 21 U.S.C. Section 841 (b) (1) (A), after the Government has intentionally destroyed the substances allegedly involved, so that the defendant is precluded from obtaining an independent measurement as to the quantity. In addition, since the best evidence as to

the quantity allegedly involved has now been systematically destroyed by the Government, in reckless disregard of the defendant's due process right to defend himself, the Sixth Amendment's right to confront the witnesses against him has been severely impaired to such an extent as to be virtually non-existent. Therefore, the Government's case against the defendant, James Edwin Sherrod, and the application of the Federal Sentencing Guidelines, should be limited to the quantity of substances actually retained and preserved by the Government.

In Brady v. Maryland, 373 U.S. 83, 10 L.Ed 2d 215, 83 S.Ct. 1194 (1963), the United States Supreme Court held that a defendant who was tried and convicted of murder was denied constitutional due process under the 14th Amendment because the prosecutor suppressed evidence favorable to the accused, to-wit: a confession of his accomplice that the accomplice actually committed the murder. In upholding the denial of constitutional due process, the Supreme Court observed:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 10 L.Ed2d 215, 218.

In doing so the court noted:

> "...Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly..." 10 L.Ed2d 215, 218.

Here the defendant, James Edwin Sherrod, has been

treated unfairly and denied due process because he filed a motion to dismiss the indictment against him on the grounds that the Government had deliberately destroyed the alleged controlled substances without the defendant being given an opportunity to weigh or measure the substances. The United States Attorney responded to the Motion to Dismiss the Indictment with this argument:

> "The case at bar is not such a close case. Agents found approximately 4500 milliliters of substance which contained methamphetamine. Since a milliliter is equivalent to a gram, this case involves 4500 grams or 4.5 kilograms of substance containing methamphetamine. This amount is not even close to the minimum of one kilogram required for enhancement." (Government's Opposition to Sherrid's Motion to Dismiss Indictment). (Emphasis supplied).

Yet on the trial of this case the Government DEA witnesses, Shoquist and Lester, testified that the quantities reported previously on the DEA forms of 4,500 milliliters disclosed to defense counsel were erroneous and that the correct amount of methamphetamine involved was given a fair trial?

Appellant submits that the case of United States v. Webster, 750 F.2d 307 (5th Cir. 1984), cert. den. 471 U.S. 1106, 105 S.Ct. 2340, 85 L.Ed.2d 855 (1985), while decided before the Federal Sentencing Guidelines, is informative on this issue. In that case the defendants had been convicted of conspiracy to possess and possession with intent to distribute over 1000 pounds of marijuana. The Government's evidence with respect to disposition of the marijuana is

summarized as follows: The agents seized 56 bales of marijuana and photographed them and observed that the bales appeared to be approximately the same size. The DEA agent weighed 12 of them which, except for the 3 smallest, weighed between 33 and 38 pounds each. The 3 smallest bales weighed approximately 25 pounds each. The DEA agent retained the three smallest bales and with permission of the assistant United States attorney, destroyed the remaining marijuana. The three smallest bales that he retained and twelve smaller samples were received into evidence. The defendants claimed that because the Government had destroyed the marijuana, Section 841(b)(6) enhancement was unavailable and evidence of the marijuana's weight should have been excluded. In rejecting this contention, the appellate court first noted, in footnote 12, that it is clear that the constitutional duties to preserve and disclose evidence apply as well to evidence relevant to the degree of punishment to be received, citing Brady v. Maryland, supra. The court then held that since the DEA agents had weighed 12 bales, and then applied their average weights to the remainder of the bales, this satisfied due process after first noting:

> "...Surely, if DEA agents weighed each bale before destruction on carefully calibrated scales, a similar deference to accuracy would be appropriate. While we would feel more comfortable if they had, we are convinced that the method used here to calculate the marijuana's weight was sufficiently accurate to render nugatory the

exculpatory value of preservation." 750 F.2d 307, 333.

Contrast that evidence with the evidence in the instant case where the DEA agents not only did not weigh or measure any of the alleged controlled substances before destruction but at trial their testimony contradicted their original reported quantities by nearly four times! The appellate court in Webster also pointed out in footnote 13 that even if they assumed that all 56 bales weighed--the estimated total weight would come to 1400 pounds. The court then concluded:

> "...We are not faced, therefore, with a close case where determination of exact weight is likely to be important; we express no opinion about such a case." 750 F.2d 307, 333.

This, however, is now the case: the determination of the exact quantity of chemicals seized and destroyed by the Government in this case is extremely important because of the Federal Sentencing Guidelines.

It should be noted that other appellate courts have expressed concern about the DEA destruction of evidence of drugs. See, e.g., United state v. Young, 535, F.2d 484 (9th Cir. 1976); and the United State v. Heiden, 508 F.2d 898 (9th Cir. 1974). In the Heiden case the appellate court observed:

> "When there is loss or destruction of such evidence, we will reverse a defendant's conviction if he can show (1) bad faith or connivance on the part of the government or (2) that he was prejudiced by the loss of the evidence..." 508 F.2d 898, 902.

Here we submit there was both. The DEA knew when it filed a motion with the United States Magistrate requesting permission to destroy any chemicals found under its search warrant that the Federal Sentencing Guidelines based the penalty on the quantity of substances found. Yet the DEA agents made no effort to weigh or measure the quantities of methamphetamine they purportedly found. Further, the defendant has been prejudiced by the destruction of the evidence since the defendant has not had an opportunity to have an independent measurement of the evidence and the DEA agents have quadrupled the quantity that they initially reported on DEA Form 7, which new evidence the trial court accepted and used in his sentencing.

In a concurring opinion in United States v. Loud Hawk, 628 F.2d 1139 (9th Cir. 1979), the appellate court, speaking through Justice Kennedy, now sitting on the Supreme Court, observed:

> "The proper balance is that between the quality of the Government's conduct and the degree of prejudice to the accused. The Government bears the burden of justifying its conduct and the defendant bears the burden of demonstrating prejudice. See United States v. Mays, 549 F.2d 670, 677, 678 (9th Cir. 1977). In weighing the conduct of the Government, the court should inquire whether the evidence was lost or destroyed while in its custody, whether the Government acted in disregard for the interests of the accused, whether it was negligent in failing to adhere to established and reasonable standards of care for police and prosecutorial functions, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification. Federal courts have greater authority and

> control over the action of federal officers than over the officers of a state, and the nature and degree of federal participation is relevant although not dispositive. It is relevant also to inquire whether the government attorneys prosecution the case have participated in the events leading to loss or destruction of the evidence, for prosecutorial action may bear upon existence of motive to harm the accused." 628 F.2d 1139, 1152.

When these criteria are applied to the instant case, it is clear that the defendant has been denied due process for the following reasons: (1) the DEA agents, aided and abetted by the United States Attorney, sought and obtained a court order authorizing the destruction of the alleged controlled substances; (2) the DEA agents made no effort to weigh or measure the suspected controlled substances at the time of the execution of the search warrant; (3) the DEA agents turned the suspected controlled substances and container over to the Disposal Services, Inc. for destruction intentionally without giving any of the defendants an opportunity to have an independent measurement made of the alleged controlled substances even though the defendants were arrested almost immediately and had counsel appointed by the court; (4) the U.S. attorney filed a superseding indictment alleging enhanced penalties after the evidence had been destroyed; (5) the Government attorney argued to the court in its opposition brief on July, 6, 1989 that "this case involves 4,500 grams or 4.5 kilograms" based upon the DEA Report of Investigation showing 4,500 milliliters of methamphetamine were seized; (6) then the

Government attorney had the DEA agents measure and "calculate" new quantities of methamphetamine the day before they testified in October 1989 and offered their testimony that the quantity seized was 17.5 kilograms and not 4.5 kilograms as defense counsel and the court had been led to believe; (7) without ever advising defense counsel of this new testimony to their complete surprise!

The harm done to the defendant, James Edwin Sherrod, is clearly calculable under the Federal Sentencing Guidelines. If the trial court had based his sentencing on the amount of alleged controlled substances preserved and retained by the Government--180 grams from Exhibits 4, 5, and 6 (Record Excerpts, Pp. 52-53)--the offense level would be significantly less than that found by the trial Court and the sentence assessed against James Edwin Sherrod would also be greatly reduced from that given him before any adjustment.

Since the systematic destruction of the alleged substances herein has denied defendant, James Edwin Sherrod, his Fifth Amendment right to due process of law, and his Sixth Amendment right to confront the witnesses against him, the indictment against the defendant should have been dismissed and his conviction should be reversed; alternatively, the allegations as to quantitiy should be stricken, together with the enhanced penalty provisions, and the case should be remanded to the trial court for proper sentencing under the Federal Sentencing Guidelines based

upon the actual quantities preserved and retained by the Government. Further in the alternative, the sentencing should be based upon the capacity of the laboratory which was 1500 grams of methamphetamine.

B. UNUSABLE LIQUID WASTE BY-PRODUCTS, NOT INTENDED FOR DISTRIBUTION OR INGESTION, SHOULD NOT BE INCLUDED IN DETERMINING THE QUANTITY OF METHAMPHETAMINE FOR

SENTENCING PURPOSES UNDER
THE U. S. SENTENCING GUIDELINES

The issue of whether unusable liquid waste by-products, not intended for distribution or ingestion, should be included in determining the quantity of methamphetamine involved for sentencing purposes should be addressed by this Honorable Court in light of the recent decisions in United States v. Jennings, 945 F.2d 129 (6th Cir. 1991), United States v. Rolande-Gabriel, 938, F.2d 1231 (11th Cir. 1991), and United States v. Elmer Acosta, 963, F.2d 551 (2nd Cir. 1992), which are in direct conflict with the opinions of three other circuits, including the Fifth Circuit Court of Appeals in this case.

In the case sub judice the Fifth Circuit Court of Appeals held that so long as the mixture involved contained a detectable amount of methamphetamine, the entire weight of mixture should be included in calculating the base offense level under the Federal Sentencing Guidelines, even if the mixture contained uningestible liquid waste material. In doing so, the Fifth Circuit followed the holdings of the

Tenth Circuit in United States v. Fowner, 947 F.2d 954 (10th Cir. 1991) and the First Circuit in United States v. Restrepo-Contreras, 942 F.2d 96 (1st Cir. 1991).

The Fifth Circuit's attempt to distinguish the case of Chapman v. United States, 500 U.S. ____, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) from being applicable to the case here does not appear to be valid. In Chapman this Court explained the legislative intent underlying 21 U.S.C. Section 841:

> "The current penalties for LSD distribution originated in the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, 100 Stat. 3207 (1986). Congress adopted a 'market oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence. H.R.Rep. No. 98-845, pt. 1, pp. 11-12, 17 (1986). To implement that principle, Congress set mandatory minimum sentences corresponding to the weight of a 'mixture or substance containing a detectable amount of' the various controlled substances, including LSD. 21 U.S.C. 841(b)(1)(A)(i)-(viii) and (B)(i)-(viii)...It intended the penalties for drug trafficking to be graduated according to the weight of the drugs in whatever form they were found--cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level. Congress did not want to punish retail traffickers less severely, even though they deal in smaller quantities of the pure drug, because such traffickers keep the street markets going. H.R.Rep. No. 99-845, supra, at pt. 1, p. 12." 114 L.Ed.2d 524, 535.

Since this Court decided Chapman, the Sixth, Eleventh and Second Circuits have utilized the Court's market-based approach in resolving issues under Section 2D1.1 of the

Sentencing Guidelines.

In United States v. Jennings, supra, the Sixth Circuit reversed and remanded a case for re-sentencing where the defendants had been convicted and sentenced based upon a mixture contained in a Crockpot of 4,180 grams of methamphetamine, which yielded a base offense of 32, instead of the estimated amount of methamphetamine which would have been produced had the chemicals been allowed to react entirely. After observing that the plain language of the statute enunciating the sentencing guidelines directs that the total weight of any mixture containing a detectable amount of methamphetamine be used for sentencing, the court noted that in that case the mixture in the Crockpot contained a small amount of methamphetamine and poisonous by-products not intended for ingestion. The court then observed:

> "...It seems fortuitous, and unwarranted by the statute, to hold the defendants punishable for the entire weight of the mixture when they could have neither produced that amount of methamphetamine nor distributed the mixture containing the methamphetamine..." 945 F.2d 129, 136.

The Court then held:

> "More importantly, using the entire weight of the contents of the Crockpot in this case would not be in keeping with the legislative intent underlying the sentencing scheme established by Congress. As Chapman makes clear, 'Congress clearly intended the dilutant, cutting agent, or carrier medium to be included in the weight of those drugs for sentencing purposes....' If the Crockpot contained only a small amount of methamphetamine mixed together with poisonous

> unreacted chemicals and by-products, there would have been no possibility that the mixture could be distributed to consumers. At this stage of the manufacturing process, the defendants were not attempting to increase the amount of methamphetamine they had available to sell by adding a dilutant, cutting agent, or carrier medium, but rather were attempting to distill methamphetamine from the otherwise uningestable byproducts of its manufacture." 945 F.2d 129, 137.

Similarly, in United States, v. Roland-Gabriel, 938 F.2d 1231 (11th Cir. 1991) the Eleventh Circuit Court of Appeals reversed and remanded a case for re-sentencing because the trial court had erred in basing the appellant's sentence upon the weight of an unusable liquid mixture of cocaine. In doing so, the appellate court first observed that in the statement of Statutory Mission, the Federal Sentencing Guidelines state that they further the basic purpose of "just punishment" and that the primary purpose of the guidelines systems is to create a scheme of "uniform and rational" sentencing. The appellate court then reasoned that the inclusion of the weight of unusable mixtures in the determination of sentences under Section 2D1.1 leads to widely divergent sentences for conduct of relatively equal severity.

The court then concluded:

> "....Although it is logical to base sentences upon the gross weight of usable mixtures, it is fundamentally absured to give an individual a more severe sentence for a mixture which is unusable and not ready for retail or wholesale distribution while persons with usable mixtures would receive far less severe sentences..." 938 F.2d 1231, 1237.

It should be pointed out that the reason that the government in the instant case obtained an order from the U.S. Magistrate authorizing the government to destroy the drugs collected and seized was because such chemicals were toxic. (Government Motion, Appendix of James Edwin Sherrod, G-2). Thus, the DEA turned the suspected drugs over to a disposal company for destruction because the DEA chemist regarded the substances as contaminated. (Testimony of George Lester on November 1, 1989, p. 35; Appellee's Brief below, pp. 15-16, 25). Moreover, the Government brief below admits that "this case involves a mixture of chemicals, some of which have synthesized into methamphetamine and which is not apt to be distributed in that state." (Appellees Brief, p. 47, emphasis supplied). This is precisely the rationale used by the Sixth Circuit Court in United States v. Jennings, 945, F.2d 129 (6th Cir. 1991) and the Eleventh Circuit Court in U.S. v. Rolande-Gabriel, supra, in remanding the cases for re-sentencing.

In reaching its decision the Sixth Circuit relied on the analysis of the United States Supreme Court in Chapman v. United States, 500 U.S. ____, 114, L.Ed.2d 524, 111 S.Ct. 1919 (1991) which pointed out that Congress adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of the pure drug involved, is used to determine the length of the sentence. In the instant case even the government concedes that the

suspected methamphetamine found by the DEA agents in the bus laboratory could not have been distributed because it was toxic or poisonous. Therefore that quantity should not have been used to determine the sentence assessed against James Edwin Sherrod.

Finally, the Sixth Circuit concluded in Jennings:

> "Because the record is not adequately developed with respect to the contents of the Crockpot, we feel that remand is necessary in order for the district court to conduct an evidentiary hearing on this issue. If, as we suspect, the defendants are correct in their assertions as to the chemical properties of the contents of the Crockpot, it would be inappropriate for the district court to include the entire weight of the mixture for sentencing purposes. Instead, the district court would be limited to the amount of methamphetamine the defendants were capable of producing. See Guidelines Manual, §2D1.1, comment. (n.12); United States v. Smallwood, 920 F.2d 1231 (5th Cir.), cert. denied, ____ U.S. ____, 111 S.Ct. 2870, 115 L.Ed.2d 1035 (1991); United States v. Putney, 906 F.2d 477 (9th Cir. 1990); United States v. Evans, 891 F.2d 686 (8th Cir. 1989), cert. denied, ____ U.S. ____, 110 S.Ct. 2170 109 L.Ed.2d 499 (1990). Because we believe that this conclusion is compelled by the legislative intent underlying the sentencing scheme of both the statute and the Sentencing Guidelines, we decline to follow those cases reaching and opposite conclusion." 945 F.2d 129, 137. (Emphasis supplied).

In the instant case the government's own Clandestine Laboratory Report and the trial testimony of DEA chemist, George Lester, showed that the capacity of the bus laboratory for producing methamphetamine was 1,500 grams. (Defendants' Exhibit No. 11, Appendix, James Edwin Sherrod,

G-5); George Lester Testimony, October 19, 1989, p. 50). It is submitted that this is the quantity on which the trial court should have pronounced the sentence of James Edwin Sherrod under the Federal Sentencing Guidelines.

As the Fifth Circuit of Appeals pointed out in U.S. v. Smallwood, 920 F.2d 1231 (5th Cir. 1991), when reviewing applications of the sentencing guidelines for legal correctness, the appellate court makes its determination de novo.

And in United States v. Acosta, supra, the Second Circuit reversed and remanded a case for re-sentencing where the defendant has been sentenced based upon the weight of both cocaine and creme liqueur in which the defendant had dissolved the cocaine before importing it. The government did not contest the defendant's argument that the creme liqueur was not ingestible and therefore was not marketable. Similarly, in the instant case the government witnesses admitted that the methamphetamine found in the bus laboratory was toxic and not marketable. The Second Circuit then analyzed the issue thusly:

> "...Does the sentencing scheme require that the weight of an unusable portion of a mixture, which makes the drugs uningestible and unmarketable, be included in the overall weight calculation? We think not." 963 F.3d 551, 553.

In doing so, the Circuit Court of Appeals also relied upon the opinion of this court in Chapman v. United States, 500 U.S. ____, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991).

Applying this rationale, it is clear that the methamphetamine found by the DEA agents in the bus laboratory was not marketable or distributable in that state and therefore the weight of the entire mixture should not have been used to calculate the defendant's sentence under the Federal Sentencing Guidelines.

Petitioner recognizes that in contrast with the decision of the Second, Sixth and Eleventh Circuits in Jennings, Rolande-Gabriel, and Acosta, cited above, there are decisions of the Tenth Circuit in United States v. Fowner, 947 F.2d 954 (10th Cir. 1991), cert. denied ____ U.S. ____, 112 S.Ct. 1998, ____ L.Ed.2d ____ (May 18, 1992) and the First Circuit in United States v. Restrepo-Contreras, 942 F.2d 96 (1st Cir. 1991) which adopt the Fifth Circuit rationale in the instant case.

Petitioner therefore submits that this Court should grant petitioner's writ of certiorari to resolve the conflicts in the different Circuit Courts of Appeal which have addressed this issue. If the Federal Sentencing Guidelines were designed to promote uniformity in the sentencing of defendants charged with similar criminal offenses-- certainly a laudable and worthy goal--such uniformity has not been achieved in the sentencing of defendants charge with possession of controlled substances. Thus, a defendant charged with possession of methamphetamine in a certain quantity would receive vastly different sentences, depending upon whether he was sentenced in the

First, Fifth, or Tenth Circuits on one hand or the Second, Sixth or Eleventh Circuits on the other hand. This is an important recurring question that needs to be resolved since it affects prisoners located everywhere in the United States the present judicial decisions produce an arbitrary array of sentences.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgement and opinion of the Court of Appeals in this matter.

DATED: November 2, 1992.

Respectfully submitted,

GAYLYN LEON COOPER
Attorney for Petitioner

UNITED STATES of America, Plaintiff-Appellee Cross-Appellant,

v.

James Edwin SHERROD, Defendant-Appellant Cross-Appellee,

and

Steven Lee Sherrod, a/k/a William Wayne Embry and Lonnie Jerrell Cooper, Defendants-Appellants,

Jerry Wayne Sewell, II and Jerry Wayne Sewell, Sr., Defendants-Appellants Cross-Appellees.

No. 90-4467.

United States Court of Appeals, Fifth Circuit.

June 23, 1992.

Defendants were convicted in the United States District Court for the Eastern District of Texas, Richard A. Schell, J., of conspiracy to manufacture, possess and distribute phenylacetone and methamphetamine. On appeal, the Court of Appeals, Garwood, Circuit Judge, held that: (1) sentences were properly calculated; (2) evidence supported finding of amount of drugs involved; (3) indictment was not defective; and (4) denial of severance was not abuse of discretion.

Affirmed.

1. **Criminal Law ⇐1206.3(1)**

Where statute set forth two different penalties for identical violations, defendants were properly sentenced, under rule of lenity, under less severe section. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(A, B), as amended, 21 U.S.C.A. § 841(b)(1)(A, B).

2. **Criminal Law ⇐1230**

Guidelines sentence will be upheld if it results from legally correct application of guidelines to factual findings that are not clearly erroneous. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

3. **Criminal Law ⇐1251**

Failure to increase drug defendant's guidelines range three levels for supervisor/manager status was not abuse of discretion, though defendant acted as chemist in drug manufacturing conspiracy, absent showing that he managed any part of conspiracy. U.S.S.G. § 3B1.1(b), 18 U.S.C.A.App.

4. **Criminal Law ⇐1251**

Increase in drug defendant's guidelines range three levels for supervisor/manager status was supported by evidence that defendant had coordinated set up of illegal drug laboratory. U.S.S.G. § 3B1.1(b), 18 U.S.C.A.App.

5. **Constitutional Law ⇐268(5)**
Criminal Law ⇐662.4, 700(9)

Arresting officers' destruction of methamphetamine and containers found in drug manufacturing lab, other than retained samples, did not deprive defendants of their rights to due process or confrontation; defendants were given ample opportunity to show that government's assertion as to amount of methamphetamine seized was incorrect. U.S.C.A. Const.Amends. 5, 6.

6. **Drugs and Narcotics ⇐133**

Finding as to amount of methamphetamine seized from defendants' laboratory was sufficiently supported by testimony of government chemist who was present at time of search of laboratory, for sentencing purposes, even though chemist's initial estimate at time of search was lower.

7. **Drugs and Narcotics ⇐133**

Drug manufacturing defendants were properly sentenced based on total weight of chemical mixture containing detectable amount of methamphetamine rather than on amount of pure methamphetamine contained in mixture. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(A, B), as amended, 21 U.S.C.A. § 841(b)(1)(A, B).

8. **Drugs and Narcotics ⇐46**

Drug Enforcement Agency had authority to designate phenylacetone as Schedule II substance; authority to make such des-

ignation was properly delegated by Attorney General. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(A, B), as amended, 21 U.S.C.A. § 841(b)(1)(A, B).

9. Constitutional Law ⇐258(3)
Drugs and Narcotics ⇐43

Drug defendants convicted of manufacturing methamphetamine were not deprived of due process, though statutory scheme allowed for exemption for manufacturer of over-the-counter product containing methamphetamine; regulatory scheme was not so ambiguous that it failed to give defendants sufficient notice that their activity was deemed criminal, and defendants had made no showing that their product was eligible for exemption or that they had attempted to obtain exemption. U.S.C.A. Const.Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 201(g)(1), as amended, 21 U.S.C.A. § 811(g)(1).

10. Constitutional Law ⇐250.1(2)
Drugs and Narcotics ⇐43

Drug defendants' conviction for manufacturing methamphetamine did not violate equal protection, though manufacturer of over-the-counter product containing methamphetamine was exempted from prosecution; medicinal benefit of over-the-counter product, together with its reduced potential for abuse, provided rational basis for exemption. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 201(g)(1), as amended, 21 U.S.C.A. § 811(g)(1); U.S.C.A. Const.Amend. 14.

11. Conspiracy ⇐43(6)

Indictment could properly charge single conspiracy even though it alleged multiple objectives, i.e., manufacturing, possessing and distributing illegal drugs; indictment properly charged single conspiracy statute involving objectives prohibited by single substantive statute. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, as amended, 21 U.S.C.A. §§ 841, 846.

12. Criminal Law ⇐622.3

Burden to show need for severance is on defendant, who must establish that he suffered compelling prejudice that court could not prevent.

13. Criminal Law ⇐622.2(4)

Severance is not required where only one conspiracy exists, even if nature of proof in each case differs, so long as court gives sufficient cautionary instructions.

14. Criminal Law ⇐1166(6)

Drug conspiracy defendants were not prejudiced by denial of severance; court cautioned jury numerous times to consider evidence as to each defendant separately and form of jury verdict submitted by court strongly reenforced requirement that jury consider each count and each defendant separately.

Gaylyn Cooper, Beaumont, Tex. (Court-appointed), for James Edwin Sherrod.

Steven C. Barkley, Beaumont, Tex. (Court-appointed), for Steven Lee Sherrod.

Linda Cansler, Beaumont, Tex. (Court-appointed), for Jerry Lee Sewell, II.

Kent Adams, Beaumont, Tex. (Court-appointed), for Jerry Lee Sewell, Sr.

Dewey J. Gonsoulin, Beaumont, Tex. (Court-appointed), for Lonnie J. Cooper.

Bob Wortham, U.S. Atty., James O. Jenkins, Paul E. Naman, Asst. U.S. Attys., Beaumont, Tex., Mervyn Hamburg, Dept. of Justice, Washington, D.C., for U.S.

Appeals from the United States District Court for the Eastern District of Texas.

Before GARWOOD and DEMOSS, Circuit Judges, and LITTLE,* District Judge.

GARWOOD, Circuit Judge:

A jury convicted the five defendants-appellants now before this Court of three counts involving, *inter alia*, conspiracy to manufacture and the manufacture of phenylacetone and methamphetamine. We affirm the convictions and sentences of all five defendants.

* District Judge of the Western District of Louisiana, sitting by designation.

Proceedings Below

Defendants Jerry Wayne Sewell, Sr. (Sewell, Sr.), Jerry Wayne Sewell II (Sewell II), Lonnie Jarrell Cooper (Cooper), James Sherrod, and Steven Sherrod were charged in a May 1989 superseding indictment.[1] Also charged in this indictment were co-defendants Jack Rhodes (Rhodes), Dan Hill (Hill), Lisa Ervin (Ervin), and Darlene Roznovsky (Roznovsky).[2] The indictment contained three counts: (1) conspiracy to (a) manufacture phenylacetone (P2P), amphetamine, and methamphetamine, (b) possess amphetamine and methamphetamine with the intent to distribute, and (c) distribute amphetamine and methamphetamine; (2) manufacturing P2P; and (3) manufacturing a mixture containing methamphetamine. The conspiracy charge and the charge of manufacturing the methamphetamine mixture alleged enhanced penalty provisions for violations of 21 U.S.C. §§ 846 and 841(a)(1) involving a kilogram or more of a mixture or substance containing a detectable amount of methamphetamine.

Following a jury trial in October and November 1989, defendants were convicted and sentenced on all three counts. They appeal their convictions and sentences on constitutional and evidentiary grounds. The Government cross-appeals the sentences of James Sherrod, Sewell, Sr., and Sewell II, alleging noncompliance with the sentencing guidelines and statutory minimum sentence provisions.

Factual Background

In early 1989, law enforcement officials from the Sheriff's Department of Calcasieu Parish, Louisiana, began working with a confidential informant, Danny Johnson (Johnson),[3] to identify and apprehend individuals involved in drug trafficking in the area. Among the names given to the authorities by Johnson was that of defendant Sewell, Sr.,[4] from whom Johnson had previously obtained methamphetamine. One of the primary goals of Johnson's cooperation with the Calcasieu Parish Sheriff's Department was to locate the laboratory source of Sewell, Sr.'s methamphetamine.

When Johnson first began work as an informant, the law enforcement officials' focus was on Sewell, Sr.'s connections with a source of methamphetamine in San Antonio, Texas, known as "Fred." Because of financial problems with Fred, however, Sewell, Sr. began making arrangements to manufacture amphetamine and methamphetamine independently.

Preparations were begun for making the drugs: several conversations concerning the conspiracy were held in Cooper's auto mechanic shop in Mossville, Louisiana; Rhodes, an associate of Sewell, Sr. from Oklahoma, located a chemist, or "cook";[5] Cooper compiled a list of the chemicals and equipment necessary for the laboratory process; Sewell II and Roznovsky collected equipment and chemicals stored on Sewell, Sr.'s property; Sewell II, Steven Sherrod, and Rhodes helped load the items into Rhodes' car, a 1977 Cadillac, for transport to the laboratory site, which was in a semi-rural area near Orange, Texas.

On March 8, 1989, Johnson, Rhodes, Steven Sherrod, and James Sherrod drove to Dallas in the Cadillac. In Dallas, they met Roznovsky who had gone there to purchase the remaining chemicals and laboratory

1. The original indictment, filed in March 1989, charged these defendants with two counts, neither of which contained an enhanced penalty provision: (1) conspiracy to manufacture P2P, amphetamine, and methamphetamine; and (2) manufacturing P2P.

2. These four co-defendants entered into plea arrangements with the Government. Each testified at trial for the Government, except Hill, who testified for the defense. None of these four are parties to the present appeal.

3. Johnson had agreed to act as a government informant in return for special treatment respecting drug charges pending against him.

4. Johnson also named Ervin, Roznovsky, and Cooper as associates of Sewell, Sr. who were involved in drug dealing.

5. Defendant Steven Sherrod introduced his uncle, defendant James Sherrod, to Rhodes at the beginning of March, 1989. James Sherrod was a chemist in the Dallas area.

equipment. These items were placed in the trunk of the Cadillac, along with the equipment and chemicals that had come from Sewell, Sr. The four men then continued on to Lake Charles, Louisiana, where Johnson had an apartment.

Law enforcement officials, in close contact with Johnson, kept the Cadillac under surveillance and contacted the Texas Department of Public Safety (DPS) to arrange a stop of the vehicle in order to obtain the identity of its occupants.[6] A DPS patrolman stopped the car near Beaumont on the pretext that a tail light was malfunctioning. He ascertained that the occupants were Johnson, Rhodes, and James Sherrod; Steven Sherrod produced false identification giving his name as William Wayne Embry. The DPS officer, as requested by Louisiana law enforcement officers, did not search the car.

Once the four men arrived in Lake Charles, Johnson contacted Cooper to get directions to the laboratory. Cooper arranged to lead them to the laboratory the next morning. The next day, the group met Cooper at a local truck stop and followed him to an auto mechanic shop near Orange, Texas, owned by Hill. The group unloaded the items from the trunk and carried them to the laboratory, which was set up in an old school bus located behind Hill's trailer. The group discovered that one of the laboratory flasks was the wrong size. Sewell, Sr., who had remained in Bells, Texas, sent Roznovsky to Orange with the proper equipment.

James Sherrod began working in the laboratory on March 9. Hill was also there working on a batch of methamphetamine that he had started before the others arrived. Steven Sherrod and Rhodes stayed in Johnson's apartment in Lake Charles. Johnson made several trips to the laboratory to check on things, reporting by telephone to Sewell, Sr. and Cooper and keeping the law enforcement officials apprised of the situation.

The Calcasieu Parish Sheriff's Department, joined by agents from the Drug Enforcement Agency (DEA) and officers from the Orange County police and sheriff departments, maintained a constant surveillance of the Hill property. Early in the morning of March 11, DEA agents obtained a warrant to search the Hill property. The officers planned to wait to execute the warrant until Sewell, Sr. arrived at the laboratory to inspect the finished product. During the afternoon of March 11, however, officers near the laboratory observed Rhodes and Steven Sherrod arrive in the Cadillac, open the trunk of the vehicle, and drive away a few minutes later. Fearing that the defendants were dismantling the laboratory to move it or that Rhodes and Steven Sherrod were removing evidence, officers stopped the Cadillac after it had crossed the state line into Louisiana. Shortly thereafter, the agents executed the search warrant at the laboratory site.

In the school bus, the agents found chemical mixtures in a cake pan, a Coca-Cola syrup canister, and a Mason jar. The agents took samples from each of these containers; tests of these samples revealed methamphetamine.[7] Precursor chemicals were also found in the bus.[8]

At the same time they obtained the search warrant, the agents also obtained from the magistrate issuing the warrant an order permitting them to destroy the chemical mixtures (except for retained samples), provided that photographs were taken of the mixtures and their containers before the destruction.[9] The order did not contain any provision allowing for the destruction of the containers themselves. Nevertheless, the agents at the scene decided to destroy the containers as well because they were contaminated by the hazardous chemical mixtures.[10] Samples of the mixtures from at least two of the containers were retained, and later tested.

Defendants were arrested and indicted on conspiracy and manufacturing charges.

6. Johnson had identified James Sherrod and Steven Sherrod to the authorities only as the "cook" and the "bodyguard," respectively.

7. The methamphetamine mixtures found were in the process of formation.

8. The DEA agents found 4,750 grams of P2P, a precursor chemical necessary for the manufacture of amphetamine and methamphetamine.

9. Agents participating in the search took still photographs and made a video of the laboratory scene.

Discussion

I. Cross Appeal.

The Government cross-appeals the sentences of Sewell, Sr. and Sewell II, contending that the district court erred in applying the statutory minimum penalty provisions of 21 U.S.C. § 841(b)(1)(B) instead of those of section 841(b)(1)(A).[11]

[1] The version of 21 U.S.C. § 841 that was in effect at the time of the offenses set forth two different penalties for identical violations of section 841(a)[12] involving one hundred grams or more of a mixture or substance containing a detectable amount of methamphetamine.[13] Under section 841(b)(1)(A), the penalty for a first-time offender was a term of imprisonment which could not be less than ten years or more than life; for a defendant with two or more final convictions for a felony drug offense, the penalty was "a mandatory term of life imprisonment without release." Section 841(b)(1)(B) provided a penalty for the same violation of a term of imprisonment which could not be less than five years and not more than forty years; if the defendant had a prior final conviction for a drug-related felony, the sentence was for a term of imprisonment not less than ten years and not more than life.

Sewell, Sr. and Sewell II were convicted of manufacturing 17.5 kilograms of a mixture containing a detectable amount of methamphetamine and were sentenced under section 841(b)(1)(B). Sewell II received the statutory minimum sentence of five years' imprisonment on each count, running concurrently. Sewell, Sr. had three prior convictions for drug-related felonies and therefore was subject to the more serious penalty. He received concurrent sentences of 360 months on all counts.

The Government contends that the Sewells should have been sentenced under section 841(b)(1)(A). Under this provision, Sewell II would have received a minimum sentence of ten years and Sewell, Sr. would have received a mandatory life sentence.

Although we would tend to agree with the Government under the current version of the statute, we are unable to do so under the version in effect at the time of the offense. *United States v. Kinder*, 946 F.2d 362, 367–68 (5th Cir.1991) (remanding for resentencing under section 841(b)(1)(B) because the district court violated the rule of lenity). Following *Kinder*, we hold that the district court did not err in sentencing the Sewells under section 841(b)(1)(B).

II. Sentences of Lonnie Cooper and James Sherrod.

The Government also cross-appeals the sentence of James Sherrod, arguing that the district court should have increased his Guidelines range three levels for supervisor/manager status based upon his role as

10. Destruction of the containers was proper according to DEA policy and Environmental Protection Agency guidelines.

11. Only the sentences of the Sewells will be considered in the determination of this issue; the sentences of the other defendants fall within the scope of either subsection.

We note that although many other sections of the 1988 Anti-Drug Abuse Amendments Act did not become effective until March 18, 1989 (120 days after enactment on November 18, 1988), Subtitle N of P.L. 100-690, which added sections 841(b)(1)(A)(viii) and 841(b)(1)(B)(viii), does not contain a provision for delayed effectiveness. A statute that does not provide otherwise becomes effective upon enactment. *United States v. Robles–Pantoja*, 887 F.2d 1250, 1257 (5th Cir.1989). Because there is no provision to the contrary, the amendments under which the defendants were sentenced became effective in November 1988, prior to the conduct for which the defendants were convicted.

12. 21 U.S.C. § 841(a)(1) makes unlawful the knowing or intentional manufacture of a controlled substance.

13. This overlap of penalties was due to a technical error in the 1988 Anti-Drug Abuse Amendments Act, which was corrected by amendment in 1990. Section 841(b)(1)(A) now applies to violations involving one kilogram or more of a substance containing a detectable amount of methamphetamine.

the chemist. *See* U.S.S.G. § 3B1.1(b).[14] Cooper raises the opposite claim, contending that the district court erred in finding him to be a supervisor/manager and in raising his Guidelines level by the required three levels. Cooper contends not only that he was not a manager or supervisor but that he was entitled to a reduction of two to four levels because of his minimal or minor role in the group. *See* U.S.S.G. § 3B1.2.[15]

[2] This Court will uphold the district court's Guidelines sentence if it results from a legally correct application of the Guidelines to factual findings that are not clearly erroneous. *United States v. Ponce*, 917 F.2d 841, 842 (5th Cir.1990), *cert. denied*, — U.S. —, 111 S.Ct. 1898, 113 L.Ed.2d 453 (1991); *United States v. Manthei*, 913 F.2d 1130, 1133 (5th Cir.1990); *United States v. Suarez*, 911 F.2d 1016, 1018 (5th Cir.1990). A finding of fact is not clearly erroneous if it is plausible in light of the record viewed in its entirety. *Anderson v. Bessemer City*, 470 U.S. 564, 573–76, 105 S.Ct. 1504, 1511–12, 84 L.Ed.2d 518 (1985). We review legal conclusions concerning the Guidelines *de novo*. *Manthei*, 913 F.2d at 1133.

[3, 4] After reviewing the record, we conclude that the factual findings made by the district court in this respect were not clearly erroneous. Although James Sherrod, as the chemist, was undoubtedly a necessary member of the conspiracy, the record supports the district court's finding that he did not manage any part of the conspiracy. Likewise, although Cooper claims that he played a minimal or minor role in the conspiracy, the district court's finding that Cooper coordinated the set up of the laboratory is based on ample evidence in the record, and adequately supports the determination that he was neither a minimal nor a minor participant.[16]

Finding no error, we affirm the sentences of James Sherrod and Lonnie Cooper.

III. Issues Related to the Finding that the Conspiracy Involved 17.5 Kilograms.

The defendants raise three issues related to the district court's finding that the conspiracy involved 17.5 kilograms of the methamphetamine mixture. First, they contend that their rights to due process and confrontation were violated because the mixtures (other than retained samples) and containers were destroyed before anyone made an accurate measurement of the amount of the mixture. Second, they claim that the district court erred in finding that the laboratory contained 17.5 kilograms of the mixture. Finally, they argue that the district court should not have sentenced them on the basis of the entire 17.5 kilograms because the mixture contained only a little pure methamphetamine. We reject each of these contentions.

A. Destruction of physical evidence

[5] Each defendant claims he was denied his constitutional rights to due process and confrontation because the Government destroyed the chemical mixtures (other than retained samples) and containers without accurately measuring the mixtures or

14. In determining whether a defendant played a supervisor/manager role in an offense, a court should consider such factors as the exercise of decision-making authority, the degree of participation in planning or organizing the offense, and the degree of control and authority exercised over others. U.S.S.G. § 3B1.1, Application Note 3.

15. Application Note 1 to section 3B1.2(a) defines a minimal participant as one who is "plainly among the least culpable of those involved in the conduct of a group," as indicated by "the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others."

A minor participant is one who is "less culpable than most other participants, but whose role could not be described as minimal." Section 3B1.2, Application Note 3.

16. For example, there is evidence that Cooper compiled a list of chemicals and equipment needed at the laboratory, that Cooper called Hill several days before the activity at the laboratory to inform Hill that some people were coming to use the lab, and that Sewell, Sr. instructed Johnson and Roznovsky to keep Cooper informed of the status of the activity at the lab.

allowing the defendants the opportunity to measure them.[17]

This issue has been addressed by a prior panel of this Court in an opinion deciding the appeal of co-defendant Jack Rhodes. *See United States v. Rhodes*, No. 90–4538 (5th Cir. September 27, 1991) [946 F.2d 891 (table)] (unpublished opinion). It is a general rule in this Circuit that one panel may not overrule the decision of a prior panel in the absence of an intervening contrary or superseding decision by the court en banc or the Supreme Court. *See, e.g., Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir.1991). Thus we are bound to follow the decision in *Rhodes* on issues previously decided.

This Court in *Rhodes* held that the destruction of the methamphetamine and containers did not deprive co-defendant Rhodes of his rights to due process or confrontation. "The process due a defendant who believes that the sentencing information is incorrect is the opportunity to show that the information is materially untrue." *Rhodes*, at p. 4 [946 F.2d 891 (table)] (citing *United States v. Rodriguez*, 897 F.2d 1324, 1328 (5th Cir.), *cert. denied*, — U.S. —, 111 S.Ct. 158, 112 L.Ed.2d 124 (1990)).

The defendants were aware long prior to their sentencings that the Government would request sentencing based upon the methamphetamine mixture being in the amount of 17.5 kilograms. The evidence produced by the Government at the trial in October and November 1989 was that the laboratory contained 17.5 kilograms of the methamphetamine mixture. In addition, the presentence reports for each defendant calculated the Guidelines sentencing level using the 17.5 kilogram figure.

The defendants were afforded ample opportunity to attempt to show that the Government's evidence was incorrect. James Sherrod and Hill testified about the quantity of drugs at James Sherrod's sentencing hearing, and James Sherrod testified on this issue again at Sewell, Sr.'s sentencing hearing. Counsel for all defendants were present at both hearings and were given an opportunity to question the witnesses. That the district court obviously found the Government's evidence more credible does not prove a due process violation.

The defendants also were not deprived of their right to confrontation. This right is substantially limited at a sentencing hearing; the district court may even base its findings on out-of-court statements. *Rhodes*, at p. 5 [946 F.2d 891 (table)]; *Rodriguez*, 897 F.2d at 1328. Although the defendants did not choose to make use of the opportunity, they could have called the DEA chemist, George Lester, to the stand at the sentencings to testify regarding the calculations of the volumes of the canister and the pan.

We hold that the destruction of the methamphetamine mixtures (other than the retained samples) and their containers did not deprive the defendants of their constitutional rights.[18]

17. We note that proof of the quantity of drugs involved does not go to guilt or innocence of the section 846 and section 841(a) violations charged, but rather only to the sentence. *See Barnes v. United States*, 586 F.2d 1052, 1056 (5th Cir.1978). Here, the indictment alleged that the quantity involved was more than one kilogram of a mixture containing methamphetamine. *Cf. United States v. Alvarez*, 735 F.2d 461, 468 (11th Cir.1984). There was no real dispute that the mixture involved did contain methamphetamine (the retained samples and the test results were made available to defendants) and that the quantity of the mixture was more than one kilogram; the dispute was whether it was only four or five kilograms or more than seventeen.

18. For due process considerations, see *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 2529, 81 L.Ed.2d 413 (1984) (defendant's due process rights violated only if the evidence destroyed (1) possessed an exculpatory value that was apparent before it was destroyed and (2) was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means); *United States v. Binker*, 795 F.2d 1218, 1230 (5th Cir. 1986) (applying *Trombetta* in the context of destruction of marijuana), *cert. denied*, 479 U.S. 1085, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987); *United States v. Webster*, 750 F.2d 307 (5th Cir. 1984) (same), *cert. denied*, 471 U.S. 1106, 105 S.Ct. 2340, 85 L.Ed.2d 855 (1985).

On the issue of the right to confrontation, see *United States v. Herndon*, 536 F.2d 1027, 1029 (5th Cir.1976) (destruction of a sample of "moonshine" liquor did not deprive a defendant

B. Factual findings of the amount of methamphetamine mixture

[6] The defendants contend that the district court erred in finding that the amount of the methamphetamine mixture found in the laboratory was 17.5 kilograms.

This Court will uphold a district court's findings about the quantity of drugs involved unless they are clearly erroneous. *United States v. Ponce*, 917 F.2d 841, 842 (5th Cir.1990). A clearly erroneous finding is one that is not plausible in the light of the record viewed in its entirety. *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

In determining drug quantities, the district court may consider any evidence which has "sufficient indicia of reliability." U.S.S.G. § 6A1.3, comment; *United States v. Manthei*, 913 F.2d 1130, 1138 (5th Cir. 1990). This evidence may include estimates of the quantity of drugs for sentencing purposes. *United States v. Coleman*, 947 F.2d 1424, 1428 (10th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1590, 118 L.Ed.2d 307 (1992). The district court's factual findings of the amount of drugs involved must be supported by what it could fairly determine to be a preponderance of the evidence. *United States v. Thomas*, 932 F.2d 1085, 1091 (5th Cir.1991), *cert denied*, — U.S. —, 112 S.Ct. 887, 116 L.Ed.2d 791 (1992).

All of the Government records created at the time of the arrest and search of the laboratory were based on the DEA agents' estimates that the amounts of the mixtures in the cake pan, Coke canister, and Mason jar totalled 4.5 kilograms. These estimates were not based on any accurate measurements made at the scene, but were conservative guesses of the amounts of the mixtures. The Government's trial evidence, however, was that the laboratory contained 17.5 kilograms of the methamphetamine mixture. This evidence consisted of the testimony of DEA Special Agent Shoquist and George Lester, a chemist for the DEA.[19] Before the trial began, Shoquist obtained and measured the capacity of a standard Coke canister of the kind that had been destroyed. Also, he reworked his estimate of the volume of the cake pan based on measurements of the pan made at the time of the search. Based upon these calculations of the volumes of the cake pan and canister, Lester testified that the methamphetamine mixture found in the laboratory totalled 17.5 kilograms.

Defendants have not overcome their difficult burden of showing that the district court's reliance on the 17.5 kilogram figure was clearly erroneous. Here, the sworn testimony of the two Government agents is a sufficient "indicia of reliability" to support the district court's findings. The district court, after hearing the testimony and viewing all the evidence, found the 17.5 kilogram estimate to be credible. The mere existence of a discrepancy between the original estimate and the evidence introduced at trial does not render the district court's use of the 17.5 kilogram amount clearly erroneous.[20] *See United*

of his Sixth Amendment right to confront witnesses as the Confrontation Clause is restricted to "witnesses" and does not include physical evidence; production of the sample or laboratory notes was not necessary to fully "confront" the government's expert); *United States v. Gordon*, 580 F.2d 827, 837 (5th Cir.) (following *Herndon*), *cert. denied*, 439 U.S. 1051, 99 S.Ct. 731, 58 L.Ed.2d 711 (1978).

19. Both Shoquist and Lester were present at the time of the search of the laboratory; Lester made the early estimates of 4.5 kilograms.

20. We note in passing that, although the defendants rely vociferously on the apparent discrepancy between the original estimate of 4.5 kilograms and the final calculation of 17.5 kilograms, the effect of the Drug Equivalency Table of the Sentencing Guidelines (as in effect when the offenses were committed; those in effect at sentencing provided a higher base offense level for the same quantity) weakens this reliance.

Because both P2P and methamphetamine were found in the laboratory, the defendants' sentences were calculated by use of the Drug Equivalency Table. The P2P and the methamphetamine were converted into "equivalent" amounts of cocaine, and the total amount of cocaine was used to determine the offense level. If the 4.5 kilogram figure were used, with the 4,750 grams of P2P, the resulting equivalent of 12.95 kilograms of cocaine would establish an offense level of 32. Using the 17.5 kilogram amount of methamphetamine, again with the 4,750 grams of P2P, the total amount of cocaine

States v. Rhodes, at pp. 3–4 [946 F.2d 891 (table)].

We hold that the district court did not err in sentencing the defendants based upon the calculation that 17.5 kilograms of drugs were involved.

C. Purity of the methamphetamine mixture

The defendants contend that use of the 17.5 kilogram figure for sentencing constitutes error because the mixture was not pure methamphetamine, and that the district court should have considered only the amount of methamphetamine that could have been produced.

This Circuit has held that consideration of the total weight of a substance containing a detectable amount of methamphetamine is proper in determining the defendant's sentence. *See United States v. Walker*, 960 F.2d 409, 412 (5th Cir.1992); *United States v. Mueller*, 902 F.2d 336, 345 (5th Cir.1990); *United States v. Butler*, 895 F.2d 1016, 1018 (5th Cir.1989), *cert. denied*, — U.S. —, 111 S.Ct. 82, 112 L.Ed.2d 54 (1990); *United States v. Baker*, 883 F.2d 13, 15 (5th Cir.), *cert. denied*, 493 U.S. 983, 110 S.Ct. 517, 107 L.Ed.2d 518 (1989).

The defendants argue, however, that a recent Supreme Court decision has in effect overruled these cases. *See Chapman v. United States*, — U.S. —, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). In *Chapman*, the Court held that the weight of blotter paper on which LSD was customarily distributed was a "'mixture or substance containing a detectable amount' of LSD," and so was properly considered in determining the proper sentence under the guidelines. *Id.* 111 S.Ct. at 1925. The Court made clear that Congress intended the carrier medium to be included in the entire weight of the mixture to determine the proper sentence. *Id.* at 1924. In making this analysis, the Court noted that "Congress adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence." *Id.* at 1925.

Both the Sixth and Tenth Circuits have addressed this issue in the context of methamphetamine since *Chapman*. *See United States v. Jennings*, 945 F.2d 129 (6th Cir. 1991); *United States v. Fowner*, 947 F.2d 954 (10th Cir.1991) (unpublished opinion), *cert. denied*, — U.S. —, 112 S.Ct. 1998, 118 L.Ed.2d 594 (1992). In *Jennings*, the Sixth Circuit refused to sentence the defendants on the basis of the total weight of a mixture that contained a small amount of methamphetamine and a large percentage of poisonous by-products. 945 F.2d at 136. The court pointed out that methamphetamine is not mixed with other chemicals in order to dilute the methamphetamine and increase the amount of saleable mixture; instead, the defendants "were attempting to distill methamphetamine from the otherwise uningestable byproducts of its manufacture." *Id.* at 137. The court concluded that the district court on remand was limited to sentencing the defendants for the amount of methamphetamine they were capable of producing.

In our recent *Walker* decision, we expressly declined to follow the *Jennings* approach.

The interpretation urged by the defendants and adopted by the Sixth Circuit appears to be inconsistent with the statute, the Sentencing Guidelines, and important passages in *Chapman*.

We note that both the statute and the Sentencing Guidelines distinguish between

is 38.95 kilograms, resulting in an offense level of 34.

The breaking point between levels 32 and 34 is between 14.9 and 15.0 kilograms of cocaine. The 4.5 kilogram figure, which the evidence revealed was clearly a conservative estimate, when converted with the P2P, produces a total amount of cocaine that is only two kilograms (of cocaine) away from the breaking point.

Thus, although the defendants point out repeatedly that the 17.5 kilograms is almost four times greater than 4.5 kilograms, the same sentencing increase would have resulted if the Government's final calculations had been of 5.5 kilograms of the methamphetamine mixture, merely one kilogram (of methamphetamine mixture) more than the original "conservative" estimate.

"pure" methamphetamine and mixtures containing methamphetamine. 21 U.S.C. §§ 841(b)(1)(A)(viii) and 841(b)(1)(B)(viii) each expressly set the same penalties based on possession of a much smaller quantity of methamphetamine *or* possession of a much larger quantity of a "mixture or substance containing a detectable amount of methamphetamine." Similarly, the footnote to the Drug Quantity Table following section 2D1.1 provides that

> "[u]nless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance.... In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater." U.S.S.G. § 2D1.1, Drug Quantity Table (November 1990).

The Drug Table distinguishes between methamphetamine and "pure" methamphetamine.[21]

The *Chapman* Court itself noted the statute's and the Sentencing Guidelines' disparate treatment of methamphetamine *vis-a-vis* other types of drugs:

> "With respect to various drugs, including heroin, cocaine, and LSD, it provides for mandatory minimum sentences for crimes involving certain weights of a 'mixture or substance containing a detectable amount' of the drugs. With respect to other drugs, however, namely PCP or methamphetamine, it provides for a mandatory minimum sentence based *either* on the weight of a *mixture or substance* containing a detectable amount of the drug, *or* on lower weights of *pure* PCP or methamphetamine.... Thus, with respect to these two drugs, Congress clearly distinguished between the pure drug and a 'mixture or substance containing a detectable amount of' the pure drug. But with respect to drugs such as LSD, which petitioners distributed, Congress declared that sentences should be based exclusively on the weight of the 'mixture or substance.' Congress knew how to indicate that the weight of the pure drug was to be used to determine the sentence, and did not make that distinction with respect to LSD." *Chapman*, 111 S.Ct. at 1924 (emphasis in original).

After distinguishing between the statutory treatment of LSD and methamphetamine, the Court went on to consider whether Congress intended that the weight of LSD carriers be included for sentencing purposes. It is in this context, after expressly distinguishing the treatment of methamphetamine and PCP, that the Court established its market-oriented analysis. Thus it does not appear that the *Chapman* Court intended its market-oriented analysis to be applied to methamphetamine or PCP, and indeed *Jennings* is the only case that has applied the market-oriented analysis of *Chapman* to methamphetamine.

In an unpublished opinion, the Tenth Circuit affirmed a sentence that was based on twenty-four gallons of a liquid mixture that contained detectable amounts of methamphetamine, but that the defendant claimed was waste. *Fowner*, 947 F.2d 954 (Table case). The court concluded, without citing *Chapman* or *Jennings*, that so long as the mixture contained a detectable amount of methamphetamine, the entire weight of the mixture should be included in calculating the base offense level.[22]

21. The Sentencing Guidelines promulgated in November 1991, although not applicable in this case, have changed the language in the Drug Quantity Table. Instead of referring to Methamphetamine and "Pure Methamphetamine," the Sentencing Guidelines now use the language Methamphetamine and Methamphetamine (actual). This change was probably intended to forestall challenges raised by defendants that their methamphetamine was not "pure" because it was not one hundred percent methamphetamine.

22. The result reached in *Fowner* is also more consistent with other circuit decisions involving mixtures of cocaine. *See United States v. Restrepo-Contreras*, 942 F.2d 96 (1st Cir.1991) (finding that entire weight of cocaine and beeswax statute was to be included for sentencing), *cert. denied*, — U.S. —, 112 S.Ct. 955, 117 L.Ed.2d 123 (1992); *United States v. Mahecha-Onofre*, 936 F.2d 623 (1st Cir.) (holding that entire weight of suitcases composed of cocaine bonded chemically with acrylic suitcase material was includable for sentencing purposes), *cert. denied*, — U.S. —, 112 S.Ct. 648, 116 L.Ed.2d 665 (1991); *United States v. Hood*, 956 F.2d 279 (10th Cir.1992) (unpublished disposition) (holding that liquid waste surrounding cocaine base was properly included in determining weight of drug for sentencing purposes). *But see United States v. Elmer Acosta*, 963 F.2d 551 (2d Cir. 1992) (concluding that weight of creme liqueur in which cocaine was dissolved was improperly included in calculating offense level because liqueur was not ingestible); *United States v. Rolande-Gabriel*, 938 F.2d 1231 (11th Cir.1991) (holding that the term "mixture" in U.S.S.G. § 2D1.1 does not include unusable mixtures of cocaine and liquid waste).

[7] We are not faced with a situation where a defendant discards some independently acquired methamphetamine by throwing it into his fishpond or stock tank. Instead, the defendants here were convicted of manufacturing methamphetamine (and phenylacetone or P2P), and conspiracy to do so, and the samples tested by the Government of the mixtures found in the laboratory were in the formative stages of the manufacturing process. These circumstances provide strong support for consideration of the weight of the entire mixture for sentencing purposes.

Following *Walker*, we hold that the district court did not err in sentencing the defendants on the basis of the entire 17.5 kilograms of the methamphetamine mixture.

IV. Delegation Issue.

[8] Two of the defendants contend that the DEA lacked authority to designate P2P as a Schedule II substance.[23] We find no merit in this argument.

These defendants assert that the DEA Administrator's order designating P2P as a Schedule II substance is void because the authority to make such a designation is the non-delegable responsibility of the Attorney General. This argument is precluded by the statute itself: 21 U.S.C. § 871 establishes the propriety of the delegation at issue. Subsection (a) of section 871 provides that the Attorney General "may delegate any of his functions under this subchapter to any officer or employee of the Department of Justice."[24] Section 871 has been in effect without amendment since the original enactment of the Drug Abuse Prevention and Control Act in 1970 and was thus in effect when the DEA Administrator placed P2P on the Schedule II list of controlled substances.

The defendants ignore section 871 and instead rely on *United States v. Spain*, 825 F.2d 1426 (10th Cir.1987), to support their contention. In *Spain*, the Tenth Circuit reversed a conviction for possession of a substance which had been placed on Schedule I by the DEA pursuant to 21 U.S.C. § 811(h), a provision added by the 1984 amendments. The court held that the 1973 delegation[25] to the DEA of the Attorney General's functions under the Drug Abuse Prevention and Control Act of 1970, although previously upheld for section 811(a), did not extend to section 811(h) because of the substantive and procedural differences between section 811(h) and section 811(a). *Spain*, 825 F.2d at 1429.

The designation provision in question here is section 811(e), which grants the Attorney General the authority to add immediate precursors of controlled substances to the list of those already regulated. Although there are no cases deciding the validity of delegation to the DEA under this provision, the Eleventh Circuit upheld the original delegation of authority to the Attorney General in *United States v. Hope*, 714 F.2d 1084 (11th Cir.1983). The court found the discretion created by section 811(e) to be indistinguishable from that created by section 811(a). *Hope*, 714 F.2d at 1087. Even the *Spain* court has upheld the delegation to the DEA of section 811(a) authority. *Spain*, 825 F.2d at 1427.

In addition, a recent Supreme Court decision disapproves of *Spain* and holds that

23. Sewell II and James Sherrod raise this issue.

24. Sections 811 and 871 are both part of Subchapter I of Chapter 13 of Title 21. The Administrator of the DEA is an "officer or employee" of the Department of Justice.

25. *See* 28 C.F.R. § 0.100.

delegation to the DEA of authority under section 811(h) is valid. *Touby v. United States*, — U.S. —, 111 S.Ct. 1752, 1758, 114 L.Ed.2d 219 (1991).

In light of 21 U.S.C. § 871 and the decision of the Supreme Court in *Touby*, defendants' reliance on *Spain* is misplaced. Their argument that the DEA lacked authority to designate P2P as a Schedule II substance fails.

V. Rynal Issue.

The defendants argue that their convictions for manufacturing methamphetamine violate the due process and equal protection clauses because the manufacturer of Rynal, an over-the-counter product containing methamphetamine, is not subject to the same penalties.[26]

21 U.S.C. § 811(g)(1) allows the Attorney General to exclude by regulation "any nonnarcotic substance from a schedule if such substance may, under the Federal Food, Drug, and Cosmetic Act, be lawfully sold over the counter without a prescription." At the time of the defendants' activity, the Attorney General had exempted Rynal from the list of Schedule II substances pursuant to this provision. 21 C.F.R. § 1308.22 (1989 Edition).[27]

[9] Defendants claim that their due process rights have been violated because the statutes create an ambiguity by subjecting them to prosecution while exempting the manufacturer of Rynal. Two unpublished opinions of the Ninth Circuit have rejected this argument in similar contexts. *See United States v. Farmer*, 956 F.2d 1168 (9th Cir.1992) (holding that 21 U.S.C. § 811 and 21 C.F.R. § 1308.22 provide fair notice); and *United States v. Worstell*, 951 F.2d 365 (9th Cir.1991) (rejecting the contention that the regulatory scheme is so ambiguous that it fails to give sufficient notice that certain activity is deemed criminal). Furthermore, the defendants have made no showing that their product is eligible for the exemption or that they attempted to make use of the procedure for obtaining an exemption for their product and were denied.

[10] Defendants contend that their conviction for manufacturing methamphetamine violates the equal protection clause because the manufacturer of Rynal is not similarly prosecuted. Because defendants' situation does not implicate either a suspect classification or the exercise of a fundamental right, the different treatment of defendants and the manufacturer of Rynal is subject only to rational basis analysis. *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2394–2395, 72 L.Ed.2d 786 (1982). The medicinal benefit of Rynal, together with its reduced potential for abuse, satisfy this review. *See United States v. Worstell.*[28]

We conclude that the defendants' convictions for manufacturing methamphetamine do not violate the due process and equal protection clauses.

VI. Conspiracy Count Issue.

Sewell II claims that the conspiracy count was defective because it alleged multiple criminal objectives and that the district court erred in refusing to dismiss it on that ground.

26. There is no authority to support defendants' position. The defendants cite two cases that held that the removal of Rynal from the schedules of controlled substances did *not* operate to remove methamphetamine itself. *See United States v. Roark*, 924 F.2d 1426 (8th Cir.1991); *United States v. Housley*, 751 F.Supp. 1446 (D.Nev.1990), *aff'd*, 955 F.2d 622 (9th Cir.1992). Defendants seek to distinguish their claims on the basis that this case concerns substances containing a detectable amount of methamphetamine rather than "pure" methamphetamine. This distinction is irrelevant in the context of the constitutional claims raised by the defendants.

27. Rynal has since been removed from the list of exempted substances. *See* 21 C.F.R. § 1308.22 (1991).

28. Defendants also contend that the order exempting Rynal, 21 C.F.R. § 1308.22 (1989 Ed.), is properly read as exempting all substances containing d1–methamphetamine hydrochloride because the section 811(g)(1) exclusion authority is limited to substance, not products. We do not so read the order, which is plainly limited to the product Rynal, a spray manufactured by Blaine Co. Nothing even remotely similar to Rynal is involved here. The defendants may not use this criminal proceeding to collaterally *expand* the plainly limited exclusion.

The defendants were charged with one count of conspiracy in violation of 21 U.S.C. § 846. The indictment alleged seven objectives of the conspiracy: (1–3) to manufacture P2P, amphetamine and methamphetamine; (4–5) to possess amphetamine and methamphetamine with the intent to distribute; and (6–7) to distribute amphetamine and methamphetamine. Each of the objectives of the conspiracy is prohibited by 21 U.S.C. § 841.

In *Braverman v. United States*, 317 U.S. 49, 63 S.Ct. 99, 102, 87 L.Ed. 23 (1942), the Supreme Court held that when there is a single agreement to violate several substantive statutes, the conspirators may not be prosecuted for more than one violation of the general conspiracy statute. This Court has held that a single conspiracy to import heroin could not violate both the general conspiracy statute, 18 U.S.C. § 371, and the statute that specifically prohibits conspiracies to import controlled substances, 21 U.S.C. § 963. *United States v. Mori*, 444 F.2d 240, 245 (5th Cir.), *cert. denied*, 404 U.S. 913, 92 S.Ct. 238, 30 L.Ed.2d 187 (1971). Neither holding applies to these facts.

[11] Although count one of the indictment here alleges seven objectives of the conspiracy, the only conspiracy statute charged is section 846. In addition, the only substantive statute implicated is section 841. It is well established that a single conspiracy may have several objectives. *United States v. Elam*, 678 F.2d 1234, 1250 (5th Cir.1982). *See also Frohwerk v. United States*, 249 U.S. 204, 39 S.Ct. 249, 63 L.Ed. 561 (1919) (conspiracy is a single crime, no matter how diverse its objects). A single charge may allege violations of more than one drug conspiracy statute. *See United States v. Rodriguez*, 585 F.2d 1234 (5th Cir.1978), *en banc*, 612 F.2d 906 (5th Cir.1980) (finding that Congress intended to permit the imposition of consecutive sentences for violations of 21 U.S.C. § 963 [conspiracy to import a controlled substance] and 21 U.S.C. § 846 [conspiracy to possess with intent to distribute], even though such violations arise from a single conspiracy having multiple objectives)[29], *aff'd sub nom. Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).

The defendants here were convicted under a single conspiracy statute involving objectives prohibited by a single substantive statute, and were given cumulative sentences for the conspiracy and the substantive offenses. We hold that the indictment was not defective and that the district court did not err in refusing to dismiss it.

VII. Severance Issue.

Sewell II and James Sherrod claim that the district court erred in refusing to sever their trials and in allowing the Government to introduce evidence of extrinsic acts committed by their co-defendants.

[12, 13] The burden to show the need for severance is on the defendant, who must establish that he suffered compelling prejudice that the court could not prevent. *United States v. Loaiza–Vasquez*, 735 F.2d 153, 159 (5th Cir.1984). Severance is not required where only one conspiracy exists, even if the nature of the proof in each case differs, so long as the court below gives sufficient cautionary instructions. *United States v. Rocha*, 916 F.2d 219, 228 (5th Cir.1990), *cert. denied sub nom. Hinojosa v. United States*, — U.S. —, 111 S.Ct. 2057, 114 L.Ed.2d 462 (1991); *United States v. Lamp*, 779 F.2d 1088, 1093–94 (5th Cir.), *cert. denied*, 476 U.S. 1144, 106 S.Ct. 2255, 90 L.Ed.2d 700 (1986). The defendants here were all charged in the same conspiracy. The district court cautioned the jury numerous times to consider the evidence as to each defendant separately.

[14] Generally, the district court may adequately minimize prejudice to a co-defendant from extrinsic act evidence by giv-

29. *Rodriguez* was overruled by *United States v. Michelena–Orovio*, 719 F.2d 738, 756–757 (5th Cir.1983), *cert. denied*, 465 U.S. 1104, 104 S.Ct. 1605, 80 L.Ed.2d 135 (1984), to the extent that it held that a defendant's guilt of conspiracy to possess with intent to distribute a controlled substance could not be inferred from the quantity of the substance that the defendant had conspired to import. *Michelena–Orovio* did not change the rule that a defendant may be convicted of violating both drug conspiracy statutes in connection with a single conspiracy.

ing limiting instructions. *See United States v. Parziale*, 947 F.2d 123, 129 (5th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1499, 117 L.Ed.2d 638 (1992); *United States v. Posner*, 865 F.2d 654, 658 n. 1 (5th Cir.1989); *United States v. Prati*, 861 F.2d 82, 86–87 (5th Cir.1988). Such instructions were given in this case.

Finally, prejudice from either the extrinsic act evidence or the failure to grant a severance was limited by the form of the jury verdict submitted by the district court that strongly reinforced the requirement that the jury consider each count and each defendant separately.[30]

We find no error on the part of the district court in refusing to allow a severance or in admitting extrinsic act evidence.

Conclusion

The convictions and sentences of all appellants are

AFFIRMED.

UNITED STATES of America, Plaintiff-Appellee,

v.

David M. SAKS, Defendant-Appellant.

UNITED STATES of America, Plaintiff-Appellee,

v.

James Doyle SPRUILL, Defendant-Appellant.

Nos. 91-5568, 91-5572.

United States Court of Appeals, Fifth Circuit.

June 23, 1992.

Defendants were convicted by jury in the United States District Court for the Western District of Texas at San Antonio, Edward C. Prado, J., of one count of conspiracy to defraud the United States and five counts of bank fraud, and they appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) there was sufficient evidence of defendants' intent to defraud banks, and omissions concerning another individual's involvement in loan transactions were material; (2) any error from jury instructions was harmless beyond a reasonable doubt; (3) incriminating statements from prior deposition in civil suit were properly admitted; and (4) defendant's convictions on several counts of bank fraud arising from single scheme to defraud were multiplicitous.

Affirmed in part and vacated and remanded in part.

E. Grady Jolly, Circuit Judge, dissented and filed opinion.

1. Banks and Banking ⇐509.10

Term "scheme to defraud" in federal bank fraud statute is not readily defined but includes any false or fraudulent pretenses or representations intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived; requisite intent to defraud is established if defendant acted knowingly and with specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to himself. 18 U.S.C.A. § 1344(1).

See publication Words and Phrases for other judicial constructions and definitions.

2. Banks and Banking ⇐509.10

Financial institution itself, not its officers or agents, is victim of fraud the bank

30. The verdict form had a separate guilty or not guilty answer blank for each defendant as to each of the two substantive counts. As to the conspiracy count, there was first an answer blank as to whether the conspiracy charged was proved beyond a reasonable doubt to have existed; then (conditional on an affirmative answer to that question) separate answer blanks as to each defendant as to whether he was found beyond a reasonable doubt to be a member of the conspiracy, and (if so) then, as to each defendant, which of the seven alleged objectives he intended. All blanks were answered adversely to each of the appellants.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
AUG 03 1992
GILBERT E. GANUCHEAU
CLERK

No. 90-4467

UNITED STATES OF AMERICA,

Plaintiff-Appellee
Cross-Appellant,

versus

JAMES EDWIN SHERROD,

Defendant-Appellant
Cross-Appellee,

and

STEVEN LEE SHERROD, a/k/a William Wayne Embry and LONNIE JERRELL COOPER,

Defendants-Appellants,

JERRY WAYNE SEWELL, II and
JERRY WAYNE SEWELL, SR.,

Defendants-Appellants
Cross-Appellees.

Appeals from the United States District Court for the Eastern District of Texas

ON PETITIONS FOR REHEARING

Before GARWOOD and DEMOSS, Circuit Judges, and LITTLE,* District Judge.

PER CURIAM:**

Defendants Jerry Wayne Sewell, Sr. (Sewell, Sr.) and Jerry Wayne Sewell, II (Sewell II) were convicted, along with three co-defendants, of three counts involving, *inter alia*, conspiracy to manufacture and the manufacture of methamphetamine and phenylacetone. We affirmed the convictions in *United States v. Sherrod*, No. 90-4467 (5th Cir. June 23, 1992). Sewell, Sr. and Sewell II now raise several issues in petitions for rehearing. We address these issues fully below and deny the petitions for rehearing.

I. Claims Raised by Sewell, Sr.

Sewell, Sr. argues in his petition for rehearing that the district court erred in calculating his criminal history for the purpose of determining his sentence under the United States Sentencing Guidelines (U.S.S.G.). Specifically, he contends that his three prior convictions, although occurring on different dates, arose out of a common criminal episode and thus should have been

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* District Judge of the Western District of Louisiana, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

considered a single conviction under the sentencing guidelines.[1] Two of Sewell, Sr.'s prior convictions were for delivery of controlled substances; the third was for delivery of heroin.

U.S.S.G. § 4A1.2(a)(2) (1990)[2] provides that "[p]rior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of the criminal history." Cases are related if they "(1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing." § 4A1.2, Application Note 3.

Sewell, Sr. did not raise this sentencing issue in his brief on appeal. Absent exceptional circumstances, we will not consider matters raised for the first time in a petition for rehearing. *Moore v. United States*, 598 F.2d 439, 441 (5th Cir. 1979); *United States v. Sutherland*, 428 F.2d 1152, 1158 (5th Cir. 1970). It appears from the presentence report and the record of Sewell, Sr.'s sentencing hearing in the present case that the three prior convictions at issue arose from three offenses that occurred on

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[1] In the present case, Sewell, Sr. was sentenced to concurrent terms of 360 months on the 3 counts of conviction. This sentence was based on an offense level of 38 and a criminal history category of VI, which yield a sentencing range of 360 months-life. Sewell, Sr. was considered a career criminal under U.S.S.G. § 4B1.1 because he had at least two prior felony convictions for controlled substance offenses; thus his criminal history category was automatically a VI.

If his prior sentences are considered related and treated as one sentence, he would have a criminal history category of II, which, combined with the offense level of 38, would result in a sentencing range of 262-327 months.

[2] The 1990 version of the U.S.S.G. was in effect at the time the defendants were sentenced in this action.

different dates and were the subject of separate judicial proceedings and sentencings.[3] The fact that all of the convictions concern controlled substance offenses does not render them part of a "common scheme or plan." Even had Sewell, Sr. raised this issue in his brief on appeal, we would find that the district court's sentencing of Sewell, Sr. on the basis of the three prior convictions was not clearly erroneous.

Sewell, Sr. claims that we erred in our determination of the chemical mixture manufactured by the defendants, although it is not entirely clear from his brief in support of the petition for rehearing what errors are alleged. We reiterate (1) that the evidence amply supports the district court's findings that the mixture containing detectable amounts of methamphetamine was in the process of formation; and (2) that the district court did not err in sentencing the defendants on the basis of the amount of the methamphetamine mixture rather than on the amount of pure methamphetamine contained in the mixture. *See United States v. Sherrod*, slip op. at 5709-5711. In addition, we hold that the evidence supports Sewell, Sr.'s conviction of conspiracy to manufacture phenylacetone, amphetamine, and methamphetamine, and of the manufacture of phenylacetone and methamphetamine.[4]

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[3] Sewell, Sr. contends in his petition for rehearing that the three prior convictions stemmed from the same original indictment. This is not sufficient to render the convictions related because they were later separated for trial and sentencing purposes. *See* U.S.S.G. § 4A1.2, Application Note 3.

[4] In his appellate brief, Sewell, Sr. claimed that the evidence revealed a conspiracy to manufacture and the manufacture of amphetamine, not methamphetamine. It is unclear whether he is

II. Claims Raised by Sewell II

Sewell II requests that we address on rehearing an issue that we inadvertently overlooked in our opinion. He contends that the district court erred in denying his motions for acquittal and for new trial on the grounds that the evidence was insufficient to support his conviction.

In weighing the sufficiency of the evidence, we view the evidence in the light most favorable to the government to determine whether the elements of the crime were proved beyond a reasonable doubt. *Glasser v. United States*, 80, 62 S.Ct. 457, 469 (1942); *United States v. Skillern*, 947 F.2d 1268, 1273 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1509 (1992). "The evidence is sufficient to support the conviction if a rational trier of fact could have found that the evidence established guilt beyond a reasonable doubt." *Skillern*, 947 F.2d at 1273. The requisite elements of a drug conspiracy are (1) the existence of an agreement, (2) the defendant's knowledge of the agreement, and (3) the defendant's voluntary participation in the agreement.[5] *United States v. Alvarado*, 898 F.2d 987, 992 (5th Cir. 1990). *See also United*

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rearguing this point in his petition for rehearing. Darlene Roznovsky, a co-conspirator who testified for the government, testified that the conspiracy was to manufacture methamphetamine, and tests performed on the samples of the chemical mixtures found during the search of the laboratory revealed the presence of methamphetamine. We hold that there was sufficient evidence to support the convictions on these grounds.

[5] If Sewell II's conviction of the conspiracy count is upheld, his convictions of the two substantive offenses will also be valid upon the theories of aiding and abetting or conspirators' liability under *Pinkerton v. United States*, 66 S.Ct. 1180, 1183-84 (1946). The district court instructed the jury on both theories.

States v. Stone, 960 F.2d 426, 430 (5th Cir. 1992).

Sewell II does not contest the existence of the conspiracy, only his awareness of and participation in it. "A defendant's knowledge of an illegal agreement and his participation in the scheme may be inferred from the circumstances." *United States v. Garcia*, 917 F.2d 1370, 1376 (5th Cir. 1990). All inferences and credibility choices are viewed in the light most favorable to the government. *United States v. Harris*, 932 F.2d 1529, 1533 (5th Cir.), *cert. denied*, 112 S.Ct. 270 (1991). A conviction will not be reversed for lack of evidence because the defendant played only a minor role in the conspiracy. *Garcia*, 917 F.2d at 1376.

Evidence at trial regarding Sewell II's awareness of and involvement in the conspiracy was not consistent. It is the role of the jury, and not of this Court, to choose which witnesses to believe. *United States v. Jones*, 839 F.2d 1041, 1047 (5th Cir.), *cert. denied*, 108 S.Ct. 1999 (1988).

The evidence linking Sewell II to the conspiracy includes the following. Danny Johnson, a government informant and witness, testified that Sewell II was present during conversations at Sewell, Sr.'s trailer concerning the preparations for the manufacturing process and that Sewell II helped bring chemicals and supplies from a storage area to load in the car that was going to the laboratory site:

> "Q Was there a meeting in the living room [of Sewell, Sr's trailer]?
>
> "A Yes, Sir.
>
> "Q Who all was present during this meeting?

> "A There was [Sewell, Sr.], Jack, J.D., Bubba, myself, Darlene and then as it went, then [Sewell II] and big Lisa got up.[6]
>
> "Q When [Sewell II] came out, was he introduced to J.D. and Bubba?
>
> "A Not that I remember. Jack knew [Sewell II].
>
> "Q Pardon me?
>
> "A I don't remember except Jack introduced [Sewell, Sr.] to J.D., Yeah, and Bubba.
>
> "Q All right. Did [Sewell, Sr.] carry on a conversation with J.D., James Edwin Sherrod?
>
> "A Yes, Sir.
>
> "Q And were you present during this conversation?
>
> "A Yes, Sir.
>
> "Q Was Bubba present during this conversation?
>
> "A Yes, Sir.
>
> "Q What about Jerry Wayne Sewell, II? Was he present?
>
> "A Back and forth, yes, Sir.
>
> "Q Where was Jerry Wayne Sewell, II. Back and forth to during the conversation?
>
> "A Well, in the kitchen and the bathroom. The living room and the bedroom where he was at was right there. It's like a half wall separates them. He got dressed and he come out and got him some coffee, went to the bathroom and he come back in there.
>
> "Q Could you hear a conversation in that bedroom next to the living room?
>
> "A Yes, Sir.
>
> "Q What happened during this conversation between [Sewell, Sr.] and J.D. or James Edwin Sherrod?

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[6] Johnson is listing co-defendants Jack Rhodes, James Edwin Sherrod (J.D.), Steven Sherrod, Darlene Roznovsky, and Lisa Ervin.

"A [J.D.] Was talking about what chemicals he needed, the quantity and what he could produce from that amount of chemicals and what he could make, what type of drugs he could make.

". . . .

"Q What happened during the conversation?

"A Well, trying to see what type of -- like [Sewell, Sr.] asked him, 'What do you need?' and J.D., he was rattling off all these different types of chemicals and stuff and he couldn't get a certain chemical, that if he could get some other kind of stuff he could mix it and he would come up with it and [Sewell, Sr.] said, 'Well, I've got some stuff here.' And he had Darlene and [Sewell II] go get it from outsides somewheres, brought it in the house, and go through and see what he had on hand, what J.D. could use.

". . . .

"Q After [Sewell, Sr.] sent [Sewell II] and Darlene Rovznoski (sic) out to get some chemicals and lab equipment, did they come back with some chemicals and lab equipment?

"A Yes, Sir.

"Q What did Darlene and Jerry Wayne Sewell, II do with these chemicals and lab equipment?

"A Set it down in the living room.

"Q Were they in a package, were they in a box, were they in a bag? How were they packaged?

"A Some in boxes and there was some in a plastic garbage like.

"Q Were these various chemicals and pieces of lab equipment removed from the boxes and bags?

"A Yes, Sir.

"Q Were they done so in the presence of Darlene Rovznoski (sic) and Jerry Wayne Sewell, II?

"A Yes, Sir.

". . . .

"Q What happened next after Darlene made this list at the direction of [Sewell, Sr.] and J.D. Sherrod?

"A We went ahead and loaded up the Cadillac with what we were going to bring from the house.

". . . .

"Q What did you load in the Cadillac?

"A Boxes - - one box with some stuff in it with a plastic bag and then our suitcases and things.

"Q Were these the items that Jerry Wayne Sewell, II. And Darlene Rovznoski (sic) had brought in from outside the trailer house?

"A Yes, Sir.

"Q Who helped load these chemicals and boxes and lab equipment into the Cadillac?

"A Jerry Wayne, myself, Bubba and Jack.

"Q When you refer to Jerry Wayne, are you referring to Jerry Wayne Sewell, II?

"A Yes, Sir."

The testimony of co-defendant Jack Rhodes, who testified for the government pursuant to a plea bargain, differs on who brought the chemicals into the trailer house and whether Sewell II helped load the equipment into the Cadillac:

"Q Did J.D. Sherrod examine any chemicals at that time?

"A No, somebody went and brought them in. Danny and a girl brought some in there and he looked at them.

"Q All right. Let me ask you this: Were some chemicals eventually brought into the house?

"A Yes, they were.

"Q And who brought those in?

"A The best I can remember, Darlene and Danny Johnson and some other individual. I don't know his name. He

ain't in this case, though, but he helped bring it in.

". . . .

"Q Did you all load these chemicals anywhere?

"A They were loaded into my car.

"Q Who helped load your car up?

"A Darlene and Danny done most of the loading. I was working on the other car. Me and Bubba was working on the other car.

"Q Did you remember seeing Jerry Wayne Sewell, II there?

"A Yeah, he just came back from going to the store, getting cigarettes, him and his girlfriend.

"Q Did Jerry Wayne Sewell, II help load the car?

"A He came over there and looked and that's the best that I remember. If he done it, I don't remember whether he picked up anything or not. I ain't for sure on that, now.

"Q Do you remember if Jerry Wayne Sewell, II handled any of the chemicals inside the trailer?

"A I'm not for sure whether he did or didn't. Seems like he did but I ain't for positive on that, now."

Another witness for the government, co-defendant Darlene Roznovsky, had still another version of the events at the trailer:

"Q Was Sewell, II and Lisa Payne at the trailer at that time?

"A Yes, they were.

"Q Were they -- would they have been close enough to overhear the conversation?

"A If they had been standing there listening for awhile they would have understood the conversation.

"Q What happened in the living room between Jack Rhodes and Sewell, Sr. and J.D. Sherrod and Bubba Sherrod?

"A They were discussing how to produce methamphetamine and the chemicals and ways they were going to produce it.

". . . .

"Q At some point in time did Jerry Wayne Sewell, Sr. instruct you to obtain some chemicals?

"A Yes, he did.

"Q Tell us about that.

"A I done this so many times before that I'm not sure if the chemicals were ever brought into the house, but me and either Jerry Wayne Sewell, II, or Glenn had went outside to get some chemicals and we were coming back to the trailer and a plumber was coming to fix a leak under the house --

"Q What did you do at that time?

"A We put the chemicals back into the truck and trailer.

". . . .

"Q Do you remember if you and Jerry Wayne Sewell, II, or Glenn ever went back out to the camper and brought chemicals back into the trailer?

"A No, Sir.

"Q If someone else testified that in fact you and Jerry Wayne Sewell, II, did that would that necessarily be incorrect?

"MR. FRY: your honor, I'm going to object to that as just an attempt to bolster this witness's testimony. She can only testify to what she knows.

"THE COURT: Restate your question, please.

"BY MR. JENKINS:

"Q Would it be incorrect if someone testified that you and Jerry Wayne Sewell, II, went out and retrieved chemicals from the camper and brought them back into the trailer?

"THE COURT: Wait a minute, wait a minute. I'll let you ask this witness what she did or didn't do but it sounds leading to tell her

something that occurred and ask her to say 'yes' or 'no.' Just as (sic) her what she did.

"MR. JENKINS: Okay.

"BY MR. JENKINS:

"Q Do you remember whether or not you and Jerry Wayne Sewell, II, went back out to the trailer and eventually brought chemicals back in?

"A No, Sir.

"Q Why is that?

"A I had been out to the trailer, outside in the truck and little trailer to get chemicals and drugs so many times that I will not remember the specific times.

"Q Had you done that with Jerry Wayne Sewell, II, before?

"A Yes, but it could have been for other things besides drugs so I can't really say we went out specifically to get drugs.

"Q But I'm talking about chemicals, too.

"A No.

"Q Could you have gone out with Jerry Wayne Sewell, II, and retrieved chemicals and brought them back --

"MR. FRY: your honor, I'm going to object to that question. It's been asked and answered.

"THE COURT: It calls for her to speculate. I'm going to sustain the objection.

"BY MR. JENKINS:

"q so, do you know whether or not you went out and obtained chemicals with Jerry Wayne Sewell, II?

"A No, Sir."

The inference that Sewell II was aware of the existence of the conspiracy follows from the testimony of both Johnson and Darlene Roznovsky that Sewell II was present during the conspirators'

conversation about the chemicals and equipment needed.

Moreover, the evidence showed that, previously to the charged conspiracy (January-March 1989), Sewell II had participated with his father, Sewell Sr., in dealing in illegal drugs, including methamphetamine. Roznovsky testified that "on occasion" Sewell II participated in sales of methamphetamine arranged by Sewell Sr. Roznovsky also related a trip in March 1988 which she, Sewell Sr., Sewell II and another woman drove from Dallas to San Antonio, where they purchased 150 pounds of marihuana, then all drove to Florida, where it was sold, then drove to Louisiana, from whence Roznovsky and Sewell II drove to near San Antonio with part of the sales proceeds and Sewell II made a payment to one "Fred" and purchased half a pound of methamphetamine. Lisa Ervin testified that in 1988 Sewell II delivered methamphetamine to someone in Oklahoma, and on another occasion rode in the car where chemicals for the manufacture of methamphetamine were thus transported to Oklahoma. All this evidence legitimately bears on Sewell II's knowledge and intent.

Sewell II's participation in the conspiracy is a closer question. Although there is some dispute as to whether he brought in the supplies and helped load them into the Cadillac, we hold that a reasonable juror could choose to believe Danny Johnson's version of the events at the trailer. These acts are sufficient to support a finding that Sewell II was a participant in the

conspiracy.[7]

Sewell II cites two cases to support his claim that, even if he was present during his co-defendants' conversation at Sewell, Sr.'s trailer and even if he did help gather and load supplies, these actions are not enough to support his conviction. These cases are distinguishable. In *United States v. Skillern*, 947 F.2d 1268 (5th Cir. 1991), this Court reversed the conviction of a defendant on grounds of insufficient evidence. The strongest evidence against the defendant was the fact that he drove a co-conspirator to a drug rendezvous and, in all likelihood, overheard the conversation between the co-conspirator and the undercover agent, and was thus in a "suspect 'climate of activity.'" *Skillern*, 947 F.2d at 1273-74. Although the panel deciding *Skillern* was suspicious of the defendant's knowledge of the conspiracy, the speculation that the defendant knew the purpose of the rendezvous before overhearing the conversation was insufficient to sustain the conviction.

In the case before us, it was possible for the jury to infer that Sewell II overheard the conversation concerning the preparations for manufacturing methamphetamine. Under *Skillern*, this alone would be insufficient to support his conviction. But here there is some evidence that Sewell II, following this conversation, was instructed to help gather together the requisite chemicals and supplies, the subject of the foregoing conversation,

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[7] The district court recognized Sewell II's limited role in the conspiracy and reduced his offense level by four levels on the grounds of his minimal participation. U.S.S.G. § 3B1.2(a).

that were stored on Sewell, Sr.'s property, and that he helped load them into a car. A reasonable juror could conclude that, not only was Sewell II aware of the existence of the conspiracy, he had acted voluntarily in furtherance of it.

In *United States v. Perrone*, 936 F.2d 1403 (2d Cir. 1991), a conviction was reversed where

> "the only concrete evidence against [the defendant] was that he assisted in loading a van with materials whose nature he was not shown to have understood, and participated in transporting and unloading them. Such activity was consistent with his normal duties [of employment]."

Perrone, 936 F.2d at 1410. The court found this evidence to be insufficient, applying a test that, in cases where a defendant's involvement is minimal, there must be "'independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy.'" *Id.* (quoting *United States v. De Noia*, 451 F.2d 979, 981 (2d Cir. 1971)).

Here, Sewell II helped to load the chemicals after hearing the conversations concerning their intended illegal use. He was aware of the nature of the items he was handling. Further, his actions were not those of an employee, as in *Perrone*.

See United States v. Garcia, 917 F.2d 1370, 1376 (5th Cir. 1990) (where we held sufficient to support a conspiracy conviction contested testimony that a defendant knew that a vehicle left in his care contained marijuana.)

Although we acknowledge that this may be a close question, we hold that the evidence was sufficient to support Sewell II's conviction.

The petitions for rehearing are DENIED.

AO 245 S (3.88) Sheet 1 - Judgment Including ...ence Under the Sentencing Reform Act

United States District Court

Eastern District of Texas

UNITED STATES OF AMERICA
V.

JAMES EDWIN SHERROD

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number B-89-44-CR(03)

(Name of Defendant)

Thomas E. Koniuszy
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☒ was found guilty on count(s) 1, 2 & 3 of the Superseding Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 § 846	Knowingly and intentionally conspire to manufacture Phenylacetone (P2P), Amphetamine and Methamphetamine	1
21 § 841(a)(1); 18 § 2	Knowingly and intentionally manufacture Phenylacetone (P2P)	2
21 § 841(a)(1); 18 § 2	Knowingly and intentionally manufacture Methamphetamine	3

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☒ It is ordered that the defendant shall pay to the United States a special assessment of $ 150.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
462-42-6819

Defendant's mailing address:
Jefferson County Jail
Beaumont, Texas 77701

Defendant's residence address:
Same

June 15, 1990
Date of Imposition of Sentence

Richard A. Schell
Signature of Judicial Officer

Richard A. Schell,
U. S. District Judge
Name & Title of Judicial Officer

June 15, 1990
Date

Crim. Order Book
Vol. 20 Page 35

Defendant: SHERROD, Jame. Edwin
Case Number: B-89-44-CR(03)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 240 months.

This term consist of terms of 240 months on each of counts 1, 2 & 3, all such terms to run concurrently.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m. / p.m. on _____.
☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: SHERROD, James Edwin
Case Number: B-89-44-CR(03)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

This term consist of terms of five (5) years on each of counts 1, 2 & 3, all such terms to run concurrently.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant shall not possess a firearm or any other explosive device or dangerous weapon.

The defendant is to participate in a drug aftercare program as directed by the U.S. Probation Office.

Defendant: SHERROD, James Edwin
Case Number: B-89-44-CR(03)

PROBATION

The defendant is hereby placed on probation for a term of N/A .

While on probation, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this Judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

Defendant: SHERROD, James Edwin
Case Number: B-89-44-CR(03)

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;
2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5) the defendant shall support his or her dependents and meet other family responsibilities;
6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Defendant: SHERROD, James Edwin
Case Number: B-89-44-CR(03)

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $ 150.00 , consisting of a fine of $ 0 and a special assessment of $ 150.00 .

☒ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

Count 1, a special assessment of $50.00.
Count 2, a special assessment of $50.00.
Count 3, a special assessment of $50.00.

This sum shall be paid ☐ immediately.
☒ as follows:

The special assessment of $150.00 shall be paid during the defendants period of supervised release.

☐ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

Defendant: SHERROD, James Edwin
Case Number: B-89-44-CR(03)

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

N/A

U. S. Probation Officer

REPORT OF INVESTIGATION

Page 1 of 8

1. PROGRAM CODE	2. CROSS FILE / RELATED FILES	3. FILE NO. MX-89-0011	4. G-DEP IDENTIFIER IC2-S1
5. BY: SA Milton E. Shoquist AT: Beaumont, Texas		6. FILE TITLE SEWELL, Jerry W.	
7. ☐ Closed ☐ Requested Action Completed ☐ Action Requested By:		8. DATE PREPARED March 14, 1989	

9. OTHER OFFICERS: See Page 6

10. REPORT RE: Execution of Federal Search Warrant on Clandestine Amphetamine/Methamphetamine Lab and Seizure of Exhibits #1 through #12

SYNOPSIS:

On March 11, 1989, at approximately 4:05PM, Drug Enforcement Administration Special Agents, Department of Public Safety Agents, and Calcasieu Parish Sheriff's Officers executed a Federal Search Warrant on an operational clandestine amphetamine/methamphetamine laboratory contained in a converted body of a bus located at Route 3 Box 512, in rural Orange County, Texas. This report details specifically the seizure of the laboratory and Exhibits #1 through #12. For details of the search of two mobile homes located on the same property, refer to DEA-6 by SA Richard D. Humphreys dated March 17, 1989.

DETAILS:

1. On March 11, 1989, at approximately 1:40AM, US Magistrate Earl Hinds signed a search warrant for two mobile homes and a bus converted into an amphetamine/methamphetamine laboratory located at Route 3 Box 512, Orange County, Texas. The information contained in the affidavit for the search warrant was provided by a confidential informant (confidentiality requested) of the Calcasieu Parish Louisiana Sheriff's Office and supported by surveillance conducted by the Calcasieu Parish Louisiana Sheriff's Office.

2. On March 11, 1989, at approximately 4:05PM, an entry team consisting of SA Milton E. Shoquist, SA Richard D. Humphreys, DPS Agent Don Palmer and Calcasieu Parish SO Deputy Dan Folds executed the search warrant on the suspected amphetamine/methamphetamine laboratory located in a converted bus body adjacent to a mobile home occupied by Danny HILL. The warrant was executed when officers on the visual surveillance observed individuals in two separate vehicles go to the converted bus and then depart the area. (For details of the arrest of the defendants in this case and the search of two mobile homes located on the property, refer to DEA-6 by SA Richard D. Humphreys dated March 17, 1989). When the entry team, consisting of the above mentioned officers/agents, entered the converted bus there were no defendants present inside. After entering the bus, the agents/officers ventilated the clandestine lab by lowering the windows that were

11. DISTRIBUTION	12. SIGNATURE (Agent)	13. DATE
REGION: Houston, FO/IO; EPIC ARI OR pmc	Milton E. Shoquist	4/11/89
DISTRICT: CASTM _____	14. APPROVED (Name and Title) RAC Robert L. Starratt, Jr.	15. DATE
OTHER		

DEA Form [illegible] - 6

DEA SENSITIVE
DRUG ENFORCEMENT ADMINISTRATION
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DEFENDANT'S EXHIBIT 9 CR-89-44-CR 10-17-89

REPORT OF INVESTIGATION (Continuation)

1. FILE NO. MX-89-0011	2. G-DEP IDENTIFIER IC2-S1
3. FILE TITLE SEWELL, Jerry W.	
4. Page 2 of 8	5. DATE PREPARED March 14, 1989
5. PROGRAM CODE	

operable on the converted bus and opening the passenger door and the rear emergency exit door. Entry to the bus had been gained through the rear emergency exit door. While making an assessment of the clandestine laboratory, SA Shoquist and Agent Palmer observed a reddish brown liquid (Exhibit #1) of suspected phenylacetone at a full boil in a 5,000 milliliter three neck beaker, approximately 3/4 full. The agents also observed a stainless steel pan setting on a space heater (which was not on) that appeared to be amphetamine or methamphetamine in its initial synthesis. After ventilating the clandestine lab, the agents/officers exited the laboratory and confirmed with other officers and agents that the defendants and premises were secure. SA's Shoquist and Humphreys then conferred with DEA Chemist George Lester and DPS Chemist Randy Snyder regarding the laboratory. Mr. Lester and Mr. Snyder then entered the clandestine laboratory to prepare for processing of evidence to be seized. At this time, Orange Police Department Task Force Inv. Johnny Butler entered the clandestine laboratory and made a video tape of all chemicals in synthesis, precursor chemicals, glassware, and lab paraphenalia contained in the converted bus. The video tape was made at approximately 4:30PM and has been retained as non-drug Exhibit N-24 in this investigation.

3. At approximately 4:15PM, SA Shoquist approached defendant James SHERROD, who was handcuffed and in the custody of Orange County Deputy Sheriff Dennis Dorsey. Deputy Dorsey stated he had participated in the arrest of SHERROD in the rear mobile home (east) of the premises and read SHERROD his rights. SA Shoquist again read SHERROD his rights, as witnessed by Deputy Dorsey. SHERROD told SA Shoquist he would like to speak to an attorney before answering any questions. SHERROD was not asked anymore questions by arresting agents or officers; however, he did make incriminating statements to Deputy Dorsey during the processing of evidence in the laboratory. (For details of the post arrest statement by SHERROD, refer to Orange County SO Report of Investigation by Deputy Dorsey dated March 11, 1989). SA Shoquist was also advised by Orange PD Inv. Butler that Danny HILL and his wife had been read their rights by Inv. Butler at approximately 4:20PM. HILL and his wife declined to make any statement at that time.

4. At approximately 4:45PM, SA Shoquist and Chemist Lester began processing evidence in the laboratory by taking representative samples of suspected phenylacetone, amphetamine, and methamphetamine in various stages of synthesis, and representative samples of precursor chemicals. Orange County PD Identification Officer Steve M. Jones also processed glassware and other items for latent fingerprints after representative samples were taken. Officer Jones is maintaining custody of the latent fingerprints to be compared against known defendants in this case.

5. Samples from the following described drug/precursor chemicals were taken to be submitted to the DEA Laboratory for analysis:

DEA Form [illegible] - 6a

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Exhibit #1 (suspected phenylacetone) is a reddish brown liquid contained in a 5,000 milliliter three neck beaker, approximately 3/4 full, seated in an electromantle heater on the floor near the passenger door of the converted bus. The three neck beaker had two condensing tubes extending from the necks and tied off to a shelf in the bus. The beaker was at a full boil at the time of entry.

Exhibit #2 (suspected phenylacetone) is a reddish brown liquid contained in a 500 milliliter seperatory funnel, which was full. Exhibit #2 was on a table below the second window on the left from the front of the bus.

Exhibit #3 (suspected phenylacetone) is a reddish brown/clear liquid in a 1,000 milliliter seperatory funnel, which was full. Exhibit #3 was also found on the table below the second window on the left from the front of the bus.

Exhibit #4 (suspected methamphetamine or amphetamine) is a milky liquid with a brown scum, approximately 2,000 milliliters in volume contained in a 8" X 16" X 6" deep stainless steel pan found sitting on a brown gas space heater (turned off) below the third window on the right from the front of the bus.

Exhibit #5 (suspected methamphetamine or amphetamine) is a pea green liquid contained in a stainless steel pressurized "coke" canister containing approximately 2,000 milliliters in volume. Shredded aluminum foil was clearly visible in the bottom of the canister after its contents were emptied out. Exhibit #5 was found on the top step near the front passenger exit of the bus.

Exhibit #6 (suspected methamphetamine or amphetamine) is a reddish brown liquid contained in a 1 quart mason jar, approximately 1/2 full. Exhibit #6 was located on the table below the second window on the left from the front of the bus. Exhibit #6 is believed to be what is commonly called "ether wash".

Exhibit #7 (suspected methamphetamine or amphetamine) is a dark reddish brown thick liquid, approximately 300 milliliters in volume contained in a 1 quart measuring cup. Exhibit #7 was located on the table below the second window on the left from the front of the bus.

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Exhibit #8 (suspected phenylacetic acid) is a white powder contained in a 1 gallon quantity brown jug labeled phenylacetic acid, which was full. Exhibit #8 was located in a non-functional deep freeze on the right in the rear of the bus.

Exhibit #9 (suspected acetic anhydride) is a clear liquid contained in an approximately 1/2 full 1 gallon jar labeled acetic anhydride. Exhibit #9 was also contained in the deep freeze in the rear of the bus.

Exhibit #10 (suspected methylamine) is a clear liquid contained in a brown 1 gallon jug, approximately 1/4 full labeled methylamine. Exhibit #10 was also found in the deep freeze at the back of the bus.

Exhibit #11 (suspected formamide) is a clear liquid contained in a full 1 gallon jug labeled formamide. Exhibit #11 was also located in the deep freeze in the rear of the bus.

Exhibit #12 (suspected sodium acetate) is a white powder contained in a opaque plastic gallon jug, approximately 1/4 full labeled sodium acetate. Exhibit #12 was also found in the deep freeze in the rear of the bus.

It should be noted that the search warrant issued by US Magistrate Earl Hinds also contained a destruction order authorizing the seizing agents to destroy suspected toxic or hazardous chemicals found at the clandestine laboratory. The following items were seized and subsequently released to DPS Chemist Randy Snyder to be used in connection with DPS Training or Laboratory Analysis.

One full gallon jug of formamide.
One gallon jug, approximately 3/4 full of acetic anhydride.
One plastic gallon jar containing phenylacetic acid.
One Corning brand 22,000 milliliter three neck beaker, round bottom.

The following items were seized and subsequently released to Resource Transportation Services, Inc., DEA Disposal Systems, Inc., Deerpark, Texas.

One full 1 gallon jug of formamide.
Two 1 gallon jugs of acetic anhydride (one empty and one 3/4 full).
Two 1 gallon plastic containers of phenylacetic acid (one full and one approximately 1/6 full)
One gallon jug of methylamine (approximately 1/3 full)
One gallon container of petrolium ether (empty)

Seven brown glass 1 gallon jugs (empty)
One pint plastic bottle bottle of hydrogen peroxide (full)
One pint bottle chloroform (1/8 full)
One 500 milliliter cylinder of HCL gas (full)
One gallon container formic acid (full)
One pint brown bottle of an unknown petrolium base fuel (full)
One pound plastic bottle of sulphur sublimed (full)
One 100 gram bottle mercuric chloride (full)
One 11.5 gram bottle calcium hydroxide (approximately 2/3 full)
One 2.5 kilogram container of sodium hydroxide (full)
One gallon plastic container of sodium acitate (approximately 1/2 full)
One 16 ounce plastic bottle of rubbing alcohol believed to be contaminated (approximately 2/3 full)
Two 1 gallon glass jugs of hydrochloric acid (one full and one 1/2 full)
One 1 liter metal can ethylether anhydrous
One O'Haus Triple Beam Balance Scale (2,610 gram capacity, contaminated with precursor chemicals)
One 4 liter bottle acetone GR (full)
Two glass condensing tubes about 36" long
One 5,000 milliliter three neck beaker
One 500 milliliter seperatory funnel
One 1,000 milliliter seperatory funnel
One 8" X 16" X 6" stainless steel pan
One stainless steel pressurized canister
One 1 quart mason jar
One 1 quart measuring cup
One three neck beaker
One 16 ounce can "Humco" ether CP
One electric vacuum pump contaminated with precursor chemicals
One Electromantle heater contaminated with precursor chemicals
Miscellaneous filter and PH test paper contaminated with chemicals
Miscellaneous assorted contaminated laboratory glassware, hoses, tubing, connectors, etc. for laboratory equipment

6. Also observed inside the trailer, and video taped, was one Uniden police scanner, one two-way intercom for communications between the bus and HILL mobile home, and two microwave ovens. These items were observed, video taped; however, they were not seized due to their being contaminated with precursor chemicals. At the conclusion of the processing of evidence, Danny HILL was given a DEA Form 12 receipt for the items seized and those items released to Resource Transportation Services, Inc. for destruction. HILL and SHERROD were transported to the Jefferson County Jail by Orange County Deputy Sheriff Inv.'s Dennis Dorsey and Jessie Romero and lodged pending formal filing of complaint.

OTHER OFFICERS:

SA Richard Humphreys, DPS Agent Don Palmer, DPS Chemist Randy Snyder, DEA Chemist George Lester, Cacasieu Parish Deputy Sheriff Dale Folds, Orange PD ID Officer Steve M. Jones, Orange County Deputy Sheriff Dennis Dorsey

DESCRIPTION AND CUSTODY OF DRUG EVIDENCE:

1. Exhibit #1, FDIN #89024780, is 92.5 grams gross weight sample of approximately 3,750 milliliters of suspected phenylacetone seized by SA Milton E. Shoquist and Chemist George Lester from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #1 was collected by DEA Chemist Lester, as witnessed by SA Shoquist, initialed, field tested, and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #1 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #1 was mailed via registered mail, return receipt requested, to the DEA Lab in Dallas, Texas for analysis.

2. Exhibit #2, FDIN #89024780, is 86.9 grams gross weight sample of approximately 500 milliliters of suspected phenylacetone seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #2 was collected by DEA Chemist George Lester, as witnessed by SA Shoquist on 3/11/89, initialed, field tested, and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #2 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #2 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

3. Exhibit #3, FDIN #89024780, is 89.1 grams gross weight sample of approximately 1,000 milliliters of suspected phenylacetone. Exhibit #3 was seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #3 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, field tested, initialed, and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #3 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #3 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

4. Exhibit #4, FDIN #89024793, is 250.9 grams gross weight sample of approximately 2,000 milliliters of suspected methamphetamine or amphetamine seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #4 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, field tested, initialed, and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #4 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #4 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

REPORT OF INVESTIGATION
(Continuation)

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5. Exhibit #5, FDIN #89024793, is 270 grams gross weight sample of approximately 2,000 milliliters of suspected methamphetamine or amphetamine seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #5 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, field tested, initialed, and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #5 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #5 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

6. Exhibit #6, FDIN #89024793, is a 237.6 grams gross weight sample of approximately 500 milliliters of suspected methamphetamine or amphetamine seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #6 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, field tested, initialed, and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #6 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #6 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

7. Exhibit #7, FDIN #89024793, is a 159.8 grams gross weight sample of approximately 300 milliliters of suspected methamphetamine or amphetamine seized from an operational clandestine lab in converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #7 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, field tested, initialed, and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #7 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #7 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas.

8. Exhibit #8, is a 38.9 grams gross weight sample of approximately 10.5 pounds of suspected phenylacetic acid seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #8 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, field tested, initialed, and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #8 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #8 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

9. Exhibit #9, is a 46.4 grams gross weight sample of approximately 1.5 gallons of acetic anhydride seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #9 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, initialed and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #9 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #9 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

REPORT OF INVESTIGATION
(Continuation)

1. FILE NO.	2. G-DEP IDENTIFIER
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10. Exhibit #10, is a 43.3 grams gross weight sample of approximately 1,250 milliliters of methlyamine seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #10 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, initialed and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #10 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #10 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

11. Exhibit #11, is a 41.5 grams gross weight sample of approximately 2 gallons of suspected formamide seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #11 was collected by DEA Chemist George Lester, as witnessed by SA Milton E. Shoquist on 3/11/89, initialed and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #11 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #11 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

12. Exhibit #12, is a 34.7 grams gross weight sample of approximately 500 grams of sodium acetate seized from an operational clandestine lab in a converted bus body located at Route 3 Box 512, Orange County, Texas. Exhibit #12 was collected by DEA Chemist George Lester, as witnessed by SA Milton Shoquist on 3/11/89, initialed and maintained in SA Shoquist's custody until 3/13/89 when Exhibit #12 was weighed and sealed, as witnessed by SA Richard Humphreys. Exhibit #12 was mailed via registered mail, return receipt requested to the DEA Lab in Dallas, Texas for analysis.

INDEXING SECTION:

1. HILL, Danny Gene NADDIS: pending
previously identified in DEA arrest 202 in this file

2. SHERROD, James Adwin NADDIS: pending
previously identified in DEA arrest 202 in this file

REPORT OF INVESTIGATION

PROGRAM CODE	2. CROSS FILE / RELATED FILES	3. FILE NO.	4. G-DEP IDENTIFIER
	☐	MX-89-0011	IC2-SI
BY: SA Milton E. Shoquist AT: Beaumont, Texas	☐	5. FILE TITLE SEWELL, Jerry W., Sr.	
☐ Closed ☐ Requested Action Completed ☐ Action Requested By:	☐	6. DATE PREPARED March 15, 1989	

OTHER OFFICERS:
Orange County Sheriff's Office Deputy Dennis Dorsey

8. REPORT RE:
Post Arrest Statement of James A. SHERROD

DETAILS:

1. Reference is made to DEA-6 by SA Milton E. Shoquist dated 3/14/89 concerning the execution of Federal Search Warrant on a converted bus body containing a clandestine amphetamine/methamphetamine lab on 3/11/89. As previously reported, James A. SHERROD was arrested in a mobile home near the clandestine lab by DPS Agent Jake Smith and Orange County Deputy Sheriff Dennis Dorsey. Deputy Dorsey took custody of SHERROD and detained him near the converted bus that contained the lab. SHERROD had previously been warned of his rights by Deputy Dorsey and again by SA Shoquist.

2. Deputy Dorsey stated that while SA Shoquist and DEA Chemis George Lester were collecting evidence and dismanteling the lab, SHERROD made an unsolicited statement to him. When SA Shoquist and Chemist Lester were attempting to determine the net volume of Exhibit #5, which was contained in a pressurized "coke" cannister, SHERROD told Deputy Dorsey it contained about 1800 ml. SHERROD further stated that in eight more hours, it would have been "meth oil". SHERROD told Deputy Dorsey that if "meth" would not have been made illegal, he (SHERROD) would not be doing this (manufactuting methamphetamine). SHERROD also stated that he thought he was "set-up" by the people who brought him down from Dallas, Texas. SHERROD told Deputy Dorsey that it takes approximately $8,000.00 to start and operation like this and that the glassware was a big expense for the initial batch, but the glassware could be reused over again.

3. The post arrest statements of SHERROD were documented in a report by Deputy Dorsey dated 3/14/89 in Orange County Sheriff's Office file I-89-0123.

INDEXING SECTION:

1. SHERROD, James Adwin NADDIS: pending
has been previously identified in DEA arrest 202 in this file

11. DISTRIBUTION	12. SIGNATURE (Agent)	13. DATE
REGION: Houston, FO/IU EPIC ARI OR pmc DISTRICT: CASTM _____ OTHER	Milton E. Shoquist 14. APPROVED (Name and Title) RAC Robert L. Starratt, Jr.	4/11/89 15. DATE

DEA Form - 6
(May 1988)